

# **I N D E X**

|                                       | <b>Page</b> |
|---------------------------------------|-------------|
| <b>Proceedings</b> .....              | <b>3</b>    |
| <b>Witnesses: For General Counsel</b> |             |
| <b>Frank C. Shelden, Jr.</b>          |             |
| Direct Examination .....              | <b>3</b>    |
| Cross Examination .....               | <b>7</b>    |
| <b>H. W. Cook</b>                     |             |
| Direct Examination .....              | <b>10</b>   |
| Cross Examination .....               | <b>14</b>   |
| <b>Frank C. Shelden, Jr.</b>          |             |
| Further Cross Examination .....       | <b>18</b>   |
| Redirect Examination .....            | <b>18</b>   |
| <b>C. E. Foster</b>                   |             |
| Direct Examination .....              | <b>19</b>   |
| Cross Examination .....               | <b>35</b>   |
| Further Cross Examination .....       | <b>49</b>   |
| Redirect Examination .....            | <b>50</b>   |
| <b>Lynn Williams</b>                  |             |
| Direct Examination .....              | <b>51</b>   |
| Cross Examination .....               | <b>54</b>   |
| <b>Edwin E. Roberts</b>               |             |
| Direct Examination .....              | <b>58</b>   |
| Cross Examination .....               | <b>67</b>   |
| Redirect Examination .....            | <b>69</b>   |
| <b>H. Clifford David</b>              |             |
| Direct Examination .....              | <b>71</b>   |
| Cross Examination .....               | <b>73</b>   |
| <b>C. E. Foster</b>                   |             |
| Further Cross Examination .....       | <b>75</b>   |

**II**  
**INDEX (Continued)**

**Page**

**Witness: For Respondent International**

**Brooks Baker**

|                            |     |
|----------------------------|-----|
| Direct Examination .....   | 78  |
| Cross Examination .....    | 94  |
| Redirect Examination ..... | 102 |

**Witness: For Respondent Local No. 22**

**Joseph R. Shrode**

|                          |     |
|--------------------------|-----|
| Direct Examination ..... | 103 |
| Cross Examination .....  | 107 |

**Witness: For Respondent Local No. 113**

**James R. Eaton**

|                           |     |
|---------------------------|-----|
| Direct Examination' ..... | 108 |
| Cross Examination .....   | 118 |

**General Counsel's Exhibit No. 2 .....** 114

**Respondent's Local Exhibit No. 1 .....** 116

**Respondent's Local Exhibit No. 2 .....** 118

**Charging Party's Exhibit No. 1 .....** 132

**Charging Party's Exhibit No. 2 .....** 147



# INDEX

iii

Original Print

|  |     |     |
|--|-----|-----|
| Proceedings in the United States Court of Appeals for the Fifth Circuit _____  | 157 | 155 |
| Order to file petition filed September 27, 1964 _____  | 157 | 155 |
| Answer of the National Labor Relations Board to petition for review and to set aside an order of the Board filed October 28, 1964 _____                    | 159 | 156 |
| Proceedings before the National Labor Relations Board _____  | 162 | 158 |
| Charge against labor organization or its agents, August 8, 1963 _____  | 162 | 158 |
| Complaint and notice of hearing, September 5, 1963 _____   | 166 | 161 |
| Answer of respondent International Union _____   | 176 | 169 |
| Answer to complaint _____  | 181 | 172 |
| Trial Examiner John F. Funke's Decision, February 3, 1964 _____  | 186 | 176 |
| Appendix A—Notice to All Members Pursuant to the recommendations of a Trial Examiner _____   | 204 | 190 |
| Appendix B—Notice to All Members Pursuant to The Recommendations of a Trial Examiner _____   | 205 | 191 |
| Exceptions of Houston Insulation Contractors Association, Charging Party, to Trial Examiner's Recommended Decision _____                                   | 207 | 192 |
| General Counsel's Cross-Exceptions to the Trial Examiner's Decision, March 25, 1964 _____  | 211 | 196 |
| Decision and order, September 4, 1964 _____  | 213 | 197 |
| Concurring and dissenting opinion, Member Leedom _____   | 222 | 203 |
| Petition for review and to set aside a decision and order of the National Labor Relations Board filed September 17, 1964 _____                             | 226 | 205 |
| Appendix—Findings of Fact and Conclusions of Law, dated September 13, 1963 in case Civil No. 63-H-452 in U.S.D.C. for the Southern District of Texas _____ | 241 | 213 |
| —Order granting temporary injunction, dated September 13, 1963 _____   | 253 | 221 |
| —Trial Examiner John F. Funke's Decision, February 3, 1964 with Appendices A & B (copy) (omitted in printing) _____  | 257 | 223 |

|  |     |     |
|--|-----|-----|
| Petition for review and to set aside a decision and order of the National Labor Relations Board filed September 17, 1964—Continued                             |     |     |
| Appendix—Findings of Fact and Conclusions of Law, dated September 13, 1963 in case Civil No. 63-H-452 in U.S.D.C. for the Southern District of Texas—Continued |     |     |
| —Decision and order, September 4, 1964 (copy) (omitted in printing) _____  | 281 | 223 |
| —Trial Examiner John F. Funke's Decision, February 3, 1964 with Appendices A & B (copy) (omitted in printing) _____  | 292 | 223 |
| Opinion on Petitioner's motion for stay and restraining order, Brown, J. _____   | 312 | 224 |
| Dissenting opinion, Rives, J. _____  | 316 | 227 |
| Order granting petitioner's motion for stay and denying motion for temporary restraining order   | 320 | 229 |
| Order granting motion of NLRB to strike from case Local 22, International Association of Heat and Frost Insulators, etc. et al. as respondents _____           | 321 | 230 |
| Order granting motion of International Association, etc. et al. for leave to file brief amicus curiae _____  | 322 | 231 |
| Minute entry of argument and submission _____  | 323 | 232 |
| Opinion, Woodbury, J. _____  | 324 | 232 |
| Decree _____   | 338 | 243 |
| Clerk's certificate (omitted in printing) _____  | 340 | 244 |
| Order extending time to file petition for writ of certiorari in No. 413 _____  | 341 | 245 |
| Orders allowing certiorari _____   | 342 | 245 |

**[11]**

**BEFORE THE  
NATIONAL LABOR RELATIONS BOARD  
Twenty-Third Region**

**In the Matter of:**

**INTERNATIONAL ASSOCIATION OF HEAT  
AND FROST INSULATORS AND ASBESTOS  
WORKERS, AFL-CIO**

**LOCAL 22, INTERNATIONAL ASSOCIATION  
OF HEAT AND FROST INSULATORS AND  
ASBESTOS WORKERS, AFL-CIO**

**LOCAL 113, INTERNATIONAL ASSOCIATION  
OF HEAT AND FROST INSULATORS AND  
ASBESTOS WORKERS, AFL-CIO**

**(ARMSTRONG CONTRACTING AND SUPPLY  
CORPORATION)**

**(JOHNS-MANVILLE SALES CORPORATION)**

**(THORPE PRODUCTS COMPANY)**

**(TECHALLOY COMPANY, INCORPORATED)**

**and Case No. 23-CC-133**

**HOUSTON INSULATION CONTRACTORS  
ASSOCIATION**

**7620 Federal Office Building,  
515 Rusk Avenue,  
Houston, Texas,  
Tuesday, October 22, 1963.**

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock, a. m.

**BEFORE:**

**JOHN F. FUNKE, Esq.,**  
Trial Examiner.

**[2] APPEARANCES:**

**ARTHUR SAFOS, Esq.,**  
6617 Federal Office Building,  
515 Rusk Avenue, Houston,  
Texas, appearing as counsel  
for General Counsel.

**VINSON, ELKINS, WEEMS & SEARLS,**  
**BY: W. D. DEAKINS, JR., Esq.**  
2100 First City National  
Bank Building, Houston,  
Texas, appearing on behalf of  
the Charging Party.

**SHERMAN, DUNN & SICKLES,**  
**BY: JOSEPH A. SICKLES, Esq.,**  
1200 15th Street, N. W.,  
Washington 5, D. C., ap-  
pearing on behalf of Inter-  
national Association of Heat  
and Frost Insulators and  
Asbestos Workers, AFL-CIO,  
Respondent.



**COMBS & MITCHELL;**  
**BY: THOMAS J. MITCHELL, Esq.,**  
 State National Building,  
 Houston, Texas, appearing  
 on behalf of Locals 22 and 113,  
 International Association of  
 Heat and Frost Insulators and  
 Asbestos Workers, AFL-CIO,  
 Respondents.

\* \* \* \*

**[4] PROCEEDINGS**

\* \* \* \*

**[16] FRANK C. SHELDEN, JR.**  
 was called as a witness by and on behalf  
 of the General Counsel . . .

\* \* \* \*

**THE WITNESS:**

Frank C. Shelden, S-h-e-l-d-e-n, 5440 Polk Avenue,  
 Houston, Texas.

**DIRECT EXAMINATION**

Q (By Mr. Safos) Mr. Shelden, by whom are you  
 employed? A J. T. Thorpe Company.

Q How long have you been an employee of Thorpe?  
 A Fifteen years.

Q In what capacity are you employed by Thorpe?  
 A President.

Q What is the nature of the business of Thorpe at  
 Houston, Texas? A We are in the business of insu-  
 lation supplies are made to insulation contractors and  
 as well as in refractory contracting and sales of in-

dustrial equipment.

**[17]** Q To whom are these sales made that you speak of? A Sales of industrial insulation supplies are made to insulation contractors and to insulation users in the Texas-Louisiana Gulf Coast area.

Q Who are some of the customers of Thorpe in this area? A Specifically some of the customers are insulation contractors, such as Johns-Manville and Armstrong, as well as insulation users, such as Humble Oil, American Oil.

Q Well, you mentioned Armstrong. What is the relation, the business relation between Thorpe and Armstrong? A On occasion Thorpe has purchased materials from Armstrong and sold materials to Armstrong.

#### **TRIAL EXAMINER:**

For how long, how long a period of time, several years?

#### **THE WITNESS:**

Several years.

Q (By Mr. Safos) Can we say from January of 1960 on, is that — A Uh-huh.

Q I don't think he can get your answer. A Yes, from January 1960 on.

Q What is the business relationship of Johns-Manville, as between Johns-Manville and Thorpe? A A Thorpe is a distributor of Johns-Manville industrial insulations.

Q Well, let's take a period within the last year.

What

**[18]** insulation products were sold by Thorpe to Armstrong? A Without checking our files, I can't specifically answer individual items. This is available, if it's of interest.

I know that on one occasion we did sell Armstrong some fabricated mitered fittings.

Q Can you recall of any other commodities that were sold to Armstrong? A There may or may not have been. I have not checked our records. I would imagine that there were other items sold to Armstrong, but I haven't —

Q What is meant by the term mitered fittings? A A mitered fitting is an insulation item that is used to cover something other than a straight piece of pipe in a pipe line, and this is made by taking standard insulation pipe covering and cutting it on a bias or miter and then gluing it together or sticking it together so that it will conform to the fitting that you are trying to shape it to.

Q Are these mitered fittings available for purchase by any of your customers? A Any of our customers, that is correct.

Q If you can tell us, please, these fittings, these mitered fittings that you have referred to, which were sold by Thorpe to Armstrong, what project were they used on by

**[19]** Armstrong? A At the time they were purchased by Armstrong, we were not told where they would go. An order was issued for these fittings and we were advised that Armstrong would call for them when they were ready.

Q (By Mr. Safos) As president of Thorpe would your records indicate where they went to, what jobs they went to? A No, they were picked up by Armstrong.

Q Can you estimate a date as to when this pick-up was made? A I can give you the date. August 6, 1963. Also on August 2, 1963; those two dates these materials were picked up.

Q That is August 2 and August 6? A That's correct.

Q Have mitered fittings been purchased from Thorpe by any other insulation employers in the Houston area?

[20] A Yes, Johns-Manville used to purchase quite a number of these items from us prior to putting in their own shop, and we still sell to other contractors that don't have their own shops, Fluor Corporation, for example.

Q What labor organization, if any, represents as bargaining agent the employees of Thorpe? A None.

Q With reference to the mitered fittings, what form of identification, if any, is used on these items as to whether or not, indicating as to whether or not they are union made? A None.

Q Is there any identification used on any items that are fabricated or manufactured by Thorpe? A Yes, some of the items we manufacture we put in our own boxes, where a brand name is involved, where a specific item is sold under a trade name.

Q Do these identifications, these tags, make reference to whether or not the commodity is or is not union made? A No.

Q As to that matter, whether there is any identification as to whether they are union or not union made, is there any marking or markings on the com-



modities sold, made, manufactured and sold by Thorpe? A On occasion we have made fittings and these fittings

[21] were made by members of Local 22 and stickers or decals, as you say, were affixed.

Q Were there any such decals or stickers on the mitered fittings sold to Armstrong? A No.

Q That is, on the two dates of pick-up of August 2 and August 6, 1963? A No.

### CROSS EXAMINATION

[22] Q (By Mr. Sickles) Would you identify this item? A That is a so-called insulation mitered fitting.

TRIAL EXAMINER:

: Which you do manufacture, is that correct?

THE WITNESS:

- This is made by our company, yes.

[23] TRIAL EXAMINER:

Yes.

Q (By Mr. Sickles) Not necessarily this one. A Not that — not necessarily that particular one.

Q Now, I will put a couple of other items on the desk in front of you. How do you make that or how does your company make that particular end product? A This item is fabricated from standard pipe covering, which comes in a form like this, only in long lengths, several feet long.

This standard pipe covering is then sliced on a bias or miter into shapes like are shown here, and then on the shapes are stuck or glued together to something like that (indicating).

Q Well, a piece of pipe covering, which is for covering of a straight pipe, is roughly how long? A Three feet, usually.

Q And how many sections does it come in? A Well, it varies. Normally it comes in two sections to cover one piece of pipe.

Q By a top and a bottom section? A Yes, like that (illustrating).

Q All right.

This product that I hold in my hand, which you have identified as a mitered fitting cover, this is not something that is manufactured by machine, is this correct?

[24] A As such, that's correct, insofar as our own operation is concerned, that is correct.

TRIAL EXAMINER:

It's cut by hand?

THE WITNESS:

That's correct. It's cut by a saw, actually.

TRIAL EXAMINER:

Saw, yes. A man operates the saw?

THE WITNESS:

That's right.

Q (By Mr. Sickles) Now, I think we established on direct examination, Mr. Sheldon, that your pipe covering material, the manufactured item, is not

made by any employee who is represented by a union? A That is correct.

Q Now, to your knowledge, only if you know, are there any manufacturers of pipe covering material whose employees are represented by members of any asbestos worker local? A I don't have knowledge of that.

Q Have you sold straight sections of pipe covering to Armstrong in the recent past? A I don't have knowledge of that. That information is available but I personally don't have the knowledge of that.

\* \* \* \*

[25] Q (By Mr. Sickles). Since January of 1960, I believe you stated, only one occasion do you know of have you sold mitered fitting covers to Armstrong? A That is correct.

Q And do you know how that came about? Were you solicited by the company? Did you solicit them?

A We received a telephone call and a phoned in purchase

[26] order for these items.

Q Have you ever discussed, other than that one phone call, have you ever discussed the fitting, mitered fitting covers, with any representative of Armstrong? A Not me personally.

Q Do you know Mr. John Zeller with Armstrong?

A No, I do not.

Q Is it the normal course of your business to sell manufactured products rather than such things as mitered fittings? A Well, I don't know what you

mean by the word normal. The majority of our business is the selling of manufactured products.

\* \* \* \*

**[28]**           Q (By Mr. Mitchell) In view of your statement that you just sold on one occasion these mitered fittings to Armstrong, would it be correct or incorrect, then, to state, as the General Counsel has in his complaint, I am reading from Paragraph 3(a), that in the course of its business Thorpe regularly sells mitered fittings to Armstrong? A Incorrect.

**MR. MITCHELL:**

I don't have any further questions.

\* \* \* \*

**[30]**

**H. W. COOK**

was called as a witness by and on behalf of the General Counsel . . .

\* \* \* \*

**THE WITNESS:**

H. W. Cook, C-o-o-k, 9519 Carousel Lane, Houston.

**DIRECT EXAMINATION**

Q (By Mr. Safos) By whom are you employed, Mr. Cook? A Techalloy Company, Incorporated.



Q How long have you been an employee of Techalloy?

[31] A About four years.

Q In what capacity are you employed?

A I am the District Sales Manager.

Q What is the nature of the business of Techalloy of Houston, Texas? A We are a manufacturer and a fabricator of stainless steel, the high nickel alloys, and aluminum wire rod and strip.

In the case of the insulation industry, we manufacture insulation strapping materials, bands, tie wire, poultry netting, seals, expander band, breather springs, and the like.

Q Who are some of your customers in the Houston area? A Well, our, all of our customers are in general the contractors, such as Johns-Manville, Armstrong, B & B Engineering, Precision Insulation.

Q Let's take Johns-Manville.

What is the business relationship of Techalloy with Johns-Manville? A We do and we have furnished them with insulation strapping materials, the materials I just listed for you.

Q Would you define the term insulation strapping material? A Yes, an insulation strapping material, or device, is either a band with a seal affixed on one end which is used

[32] to secure pipe covering or other forms of insulation around a pipe or vessel or other types of equipment.

It is nothing more than a securement.

\* \* \* \*

Q How long has the business relationship between Techalloy and Johns-Manville existed? A Well, I

have been down here four years and we have been doing business during that time and I am sure prior to that time.

Q Now, getting back to the business relationship, what products, if you know, please, sir, that are fabricated or manufactured by Techalloy here at Houston have been sold to Johns-Manville at Houston, say within the period of the last year? A Well, let me explain my mode of operation. Maybe this

[33] will make the point clear for the Trial Examiner.

We, first of all, in locating potential orders, make it our business to see the drawings, the plans and specifications of a particular job that may be up for competitive bidding. And on this particular drawing it will indicate the pipe diameters or the vessel diameters.

In some cases it is feasible, economically, for us to offer material cut to a specific length for pipe covering, for example.

In the particular case involved here, I had located the drawings for this American Oil feed line, and it was readily obvious that eighteen thousand feet of pipe of one diameter certainly warranted pre-cut bands, and it was my suggestion to Johns-Manville that they consider our bid on that basis. We have done this before. We are doing it now. And we are going to do it in the future.

\* \* \* \*

[36] Q (By Mr. Safos) Now, we were also discussing, I believe, the specific project for which these bands were purchased. Now, will you tell us about that? A Yes, there were three phases to this project. There were the two large —

Q Well, where is it located? A It's in Texas City, Texas.

Q What does it consist of? A It's the American Oil ammonia plant. There were three phases, two large storage tanks, the ammonia plant, itself, and the feed line.

Q All right. A Mundet Cork insulated the two large storage tanks.

[37] American Insulation in Beaumont, Texas, insulated the ammonia plant equipment, itself, and Johns-Manville insulated the feed line, and we furnished materials on all three jobs.

\* \* \* \*

[39] Q (By Mr. Safos) What form of identification, if any, was used on the pre-cut stainless steel bands? A Just a tag with Techalloy on it and the description of the material, with thickness and length.

Q Was there any form of identification, if you know, please, sir, which indicated whether or not they were union made?

[40] A No.

\* \* \* \*

Q What labor organization, if any, represents as bargaining agent the employees of Techalloy in the manufacture of this commodity? A There is no labor organization.

\* \* \* \*

## CROSS EXAMINATION

Q (By Mr. Mitchell) ...

\* \* \* \*

[42] Q Now, I want to ask you this question, Mr. Cook.

Have you ever, in your experience with the Tech-alloy Company, been confronted with a situation where you have supplied your manufactured products to any insulation contractor, such as Johns-Manville, and had your manufactured products 'boycotted' by employees of Johns-Manville or any other contractor?

\* \* \* \*

[43] Q (By Mr. Mitchell) Have any of your manufactured products as distinguished from your manufactured and prefabricated products—

TRIAL EXAMINER:

All right. I see it now. Have they?

[44] Q (By Mr. Mitchell) — have they run into any kind of boycott insofar as Johns-Manville or any other contractor, insulation contractor, is concerned in this area in the past ten years?

A No, the only instance is this one that we have in mind at the moment.

\* \* \* \*

Q (By Mr. Mitchell) All right. Since the date of this charge, or let's just say since July of 1963, this year, I presume, Mr. Cook, that you have continued



to supply stainless steel and high nickel alloy products to Johns-Manville as well as other insulation contractors in this area? A That's correct.

Q Manufactured products? A That's correct.

Q As distinguished from prefabricated and manufactured products? A Yes, that's correct.

[45] TRIAL EXAMINER:

We have got it narrowed down now.

Q (By Mr. Mitchell) And have you, since July of 1963, run into any kind of boycott of your products, your manufactured products, by any of the employees?

MR. SAFOS:

This is a very narrow period of time, from what date, from the beginning of July up to now. Well, now, of course, that includes September 13, 1963, at which time there was an injunction.

TRIAL EXAMINER:

All right, up to September 13 put the cut-off date, then.

[46] Q (By Mr. Mitchell) From July of 1963 until —

TRIAL EXAMINER:

September 13.

Q (By Mr. Mitchell) — September 13, 1963, I presume, Mr. Cook, that you have supplied different in-

sulation

[47] contractors in this area, Johns-Manville included, with your manufactured products?

A That is correct.

TRIAL EXAMINER:

And there has been no boycott of them, has there?

THE WITNESS:

No, sir.

[49] FRANK C. SHELDEN, JR.

recalled as a witness by and on behalf of the General Counsel, . . .

### FURTHER CROSS EXAMINATION

Q (By Mr. Sickles) Whether or not you have sold straight line asbestos pipe covering, whatever material it may be, to Armstrong. A There were six sales made in 1963, fifteen sales in 1962, nine sales in 1961.

The quantities varied from orders amounting to approximately ten dollars up to a maximum of a thousand dollars.

[50] Q All right.

And the other area that you were to find out was whether or not there have been instances of union decals having been placed on your mitered fit-

things subsequent to the time that Thorpe ceased being an insulation contractor. A That is correct.

There were two major instances, one, [51] a large job that Fluor Corporation had with American Oil in Texas City to build a new alkylation unit in 1961, where a large quantity of these type items were sold to Fluor by us, made in our shop by union asbestos workers, upon which were affixed decals stating that they were union made.

Another instance in 1961 to Singmaster & Breyer, who were the general contractors for a new plant being built in Beaumont, Texas, for the Houston Chemical Company, again where a large quantity of these type fittings were sold by us to Singmaster & Breyer, having been fabricated in our shop by union asbestos workers, and a decal affixed thereon.

There were others, but those were the two major ones.

Q And that was in 1961? A That's correct.

Q And when was it you ceased being an insulation contractor? A December 31, 1960.

Q And what was the specific dates of these in 1961, if you will? A Well, it was over a rather extended period of time. I mean, these were fairly large jobs and this might have gone on for quite a period.

Q Well, the collective bargaining agreement in effect at that time extended through June of 1961, did it not?

[52] A I have no idea.

Q Do you recall if you advised Local 22 that you were no longer an insulation contractor? A I don't have any knowledge of so advising.

Q Now, the one other item that you mentioned, that these decals said they were union made. Do you

know that they said they were union made? A No, no, I do not know that.

\* \* \* \*

### REDIRECT EXAMINATION

Q (By Mr. Deakins) Do you know where the decals came from that were placed on these materials, Mr. Sheldon? A They were supplied by the asbestos worker who was working in our shop.

Q And how did you know that he was a member of the union? A We had hired him previously when we were an insulation contractor.

Q And he put those on, himself, is that right? A That is correct.

Q Now, did he put those on any work that was performed by persons who were not members of the union? A No.

\* \* \* \*

[55]

C. E. FOSTER

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

#### TRIAL EXAMINER:

Give your name and address to the reporter, please.

#### THE WITNESS:

C. E. Foster, 7010 Leader Street, Houston, Texas.



[56]

## DIRECT EXAMINATION

Q (By Mr. Safos) Mr. Foster, by whom are you employed? A I am employed by Armstrong Contracting and Supply Corporation.

Q And in what capacity, please, sir? A As branch manager in Houston.

Q How long have you been working for Armstrong? A Thirteen years.

Q Mr. Foster, what is the business relationship between Armstrong and Thorpe Products Company? A Armstrong purchases materials from Thorpe Products Company from time to time and Thorpe purchases materials from Armstrong from time to time.

Q What specific products are purchased from Thorpe? A We have purchased pipe covering, prefabricated fitting covers and prefabricated blankets.

Q Prefabricated fitting covers, is this the same term referred to as mitered fittings? A As a mitered fitting, yes.

TRIAL EXAMINER:

You saw the material that was being examined here before?

THE WITNESS:

Right.

TRIAL EXAMINER:

That is the type of material you have purchased from Thorpe?

THE WITNESS:

Right.

**[57] TRIAL EXAMINER:**  
Is that correct?

**THE WITNESS:**  
That's correct.

**TRIAL EXAMINER:**  
And that is what you call prefabricated?

**THE WITNESS:**  
Right.

**Q (By Mr. Safos)** How long has this business relationship with Thorpe been in existence? **A** Since the Thorpe Company began, I think in 1961.

**Q** What construction insulation work is Armstrong engaged in currently? **A** We have several projects, but one that we have at Victoria, Texas, for the Lummus Company at the duPont plant.

**TRIAL EXAMINER:**  
Is that the project which is the concern of this proceeding?

**THE WITNESS:**  
Yes.

**Q (By Mr. Safos)** How long has this business re- of? **A** This is an ammonia plant installation for duPont, which consists of the fabrication and erection of various vessels and the insulation of these vessels and piping.

**TRIAL EXAMINER:**  
Did you purchase materials from Thorpe in connection with this project?

THE WITNESS:

Yes, we did.

TRIAL EXAMINER:

Prefabricated materials I am referring to, of course.

[58] THE WITNESS:

Yes, we did.

TRIAL EXAMINER:

You did.

Q (By Mr. Safos) And were these materials delivered to this project site? A Yes, they were.

Q I believe in response to the Trial Examiner's inquiry you said they were purchased from Thorpe, is that correct? A Yes, sir.

Q Who is Mr. Robert D. Graham? A Robert Graham is our foreman on the job, at the job site.

Q How long have you known him? A I have known Mr. Graham about ten years.

Q Has he worked on other jobs for Armstrong? A Yes, he has.

Q In the same capacity, that is, as a supervisor or as a foreman? A Yes, sir.

Q What information do you have regarding Mr. Graham's affiliation, if you do have any such information, concerning membership with or in a labor organization? A I understand he is a member of Local 113 in Corpus Christi.

Q You say you understand? A He said he is.

\* \* \* \*

**[59]**        **Q** How many insulation employees were on this project, that is, I am speaking of insulation employees of Armstrong in the period, let's say, of June and July 1963? **A** Approximately sixteen.

\*       \*       \*       \*

**Q** Please state whether or not Mr. Graham discussed with you any insulation problems on this project. **A** Yes. The latter part of June, when a supply of fittings, fitting covers were sent to the project, Mr. Graham, being unable to get in touch with Mr. Williams at that time, called me direct in Houston and told me that —

\*       \*       \*       \*

**[60]**        **A** Advising that the members of Local 113 working for Armstrong at the job site would not apply the fittings that we sent to the job.

**Q** (By Mr. Safos) You say fittings. What fittings were these? **A** Fitting covers, the mitered fitting covers.

**Q** That were purchased from whom? **A** From Thorpe. Some were made in our shop.

**Q** Did he give you any further reasons? **A** Because they did not have a union label.

**Q** When did the discussion take place?

**TRIAL EXAMINER:**

Sometime in June, I believe you testified.

\*       \*       \*       \*

**[61]** Q (By Mr. Safos) Were there any other discussions with Mr. Graham? A Yes, after several meetings here in Houston to resolve this problem —

**TRIAL EXAMINER:**

Meetings with whom?

**THE WITNESS:**

With Mr. Baker and Mr. Schrodé of the International and Local 22. We called a meeting at the job site between Mr. DeQuir, Lummus Company superintendent, myself, Mr. Williams and Mr. Eaton, the business agent of Local 113, to see if we could plead with them to go ahead and apply these fittings because it was holding up the progress of the job.

**TRIAL EXAMINER:**

Now, excuse me. Do I understand between the time that Mr. Graham spoke to you and told you that the men were not applying the fittings, and the time of this meeting, the fittings had not been applied is that correct?

**THE WITNESS:**

No fitting had been applied, that's correct.

**TRIAL EXAMINER:**

No fittings had been applied. Thank you.

Q (By Mr. Safos) I believe you were discussing this meeting on the job site. A We held a meeting in Mr. DeQuir's office in order to —

**[62]** Q This is right on the project site, itself?

A Yes, sir.



**TRIAL EXAMINER:**

Can we get the date of this meeting? Was it in July or how long after —

**THE WITNESS:**

It was the last week in July.

**TRIAL EXAMINER:**

Last week in July. Thank you.

**THE WITNESS:**

Yes, sir.

**TRIAL EXAMINER:**

Thank you.

A And we asked Mr. Eaton if he would not have his men go ahead and apply these fittings, and he said that "Is that all we have to discuss, gentlemen?" And that was the end of the meeting.

Subsequent to that —

**TRIAL EXAMINER:**

That was his only response?

**THE WITNESS:**

Yes, sir.

**TRIAL EXAMINER:**

"Is that all we have to discuss, gentlemen"?

**THE WITNESS:**

Yes, sir.

**TRIAL EXAMINER:**

And left, that was the end of the meeting, rather?

**THE WITNESS:**

Yes, that was the end of the meeting in Mr. DeQuir's office.

**TRIAL EXAMINER:**

Go ahead.

**THE WITNESS:**

Outside Mr. DeQuir's office, later on, Mr. Eaton advised us that he was merely carrying out orders

[63] Q (By Mr. Safos) When you say "advised us," who do you mean, "advised us"? A Mr. Williams and myself. That he could not permit his men to apply those fittings.

Q And who is Mr. Eaton? A Business agent for Local 113.

Q Mr. Foster, who is Mr. Brooks Baker? A He is the vice-president of the International Association of Asbestos Workers, Heat and Frost Insulators.

Q Do you know if he has any other capacity with the labor organization? A I understand he is the Secretary of Local 22.

Q Do you personally know Mr. Baker? A Yes, sir.

Q What discussions, if any, were there with Mr. Baker or with any other representatives of the respondent unions concerning installation of insulation fittings or other items? Do you recall of any discussions concerning — I am asking you now about the installation of any insulation fittings on construction insulation work. A Yes, on June 3rd Mr. Baker and Mr. Schrode were invited to a meeting of the Houston Insulation Contractors Association to discuss the application of labels to prefabricated fittings. They

presented their reasons why they wanted the labels on there. We gave them our reasons why we did not

[64] think we should be forced to apply these labels. The Association then notified the union by letter, signed by all members of the Association, that we would not permit this practice in our shops.

Q Where was this meeting held, you say? I believe you said on June 3rd. A This was held at the Houston Engineering and Scientific Society Building.

Then on July —

Q Well, before we go off this, what were the reasons assigned by Mr. Baker in his view? A To identify these fittings as being made by union people.

Q Were there any other reasons given by either Mr. Baker or by Mr. Schrode? A Not to my recall.

Q Please continue. A Then on — you want the other meetings?

Q All right, sir. A July 16, we then had two or three jobs that were being held up because the union had refused to apply fittings that did not bear the union label. And —

TRIAL EXAMINER:

When you say "we," do you mean Thorpe?

THE WITNESS:

No, the Houston Insulation Contractors Association, members of that.

[65] TRIAL EXAMINER:

Oh, I understand.

Q (By Mr. Safos) Let me clear this up. What position, if any, did you have with Houston Insulation

Contractors Association? A I am at present president of that Association.

Q All right. Go ahead. A A meeting was called on July 16 in which Mr. Baker was present with the Association again attempting to resolve this work stoppage or refusal on the part of their employees to apply fittings. And nothing was resolved. We were told that these men could not apply these fittings unless they bore a union label.

\* \* \* \*

Q Do you know who the members are of this Association?

[66] A Yes, sir.

Q Who are they, please, sir? A They are the Hebert Company, Armstrong Contracting and Supply, B&B Engineering, Industrial Insulators, Precision Insulation Company, and Mundet Cork Company.

Q Is Johns-Manville also a member? A I am sorry. Johns-Manville, also.

Q Were there any other discussions with Mr. Baker? A No, sir.

Q Were there any discussions between you and Mr. Baker after these meetings, say, the July 16, 1963, meeting? A Yes, sir, we had a telephone conversation, as I recall.

Q Do you recall when this conversation took place? A Sometime in July.

**TRIAL EXAMINER:**

What was said?

**THE WITNESS:**

Well, during the conversation Mr. —

**TRIAL EXAMINER:**

Who called whom?

**THE WITNESS:**

I don't recall.

**TRIAL EXAMINER:**

All right. Tell us what the conversation was, then.

**THE WITNESS:**

The call was about something else, and some other subject.

**TRIAL EXAMINER:**

All right.

**THE WITNESS:**

But during the —

**TRIAL EXAMINER:**

And in the conversation what happened,  
[67] what was said about the insulation problem?

**THE WITNESS:**

Mr. Baker said that he felt that our difficulties that we were having could have been resolved in another manner, and I replied that it seemed to me that we tried almost all avenues of resolving these problems, and Mr. Baker said that, well, this only meant one thing to him, and I said, "What is that?"

And he said, "That is the beginning of the end of the specialty contractor."



**Q** (By Mr. Safos) What is this in reference to? A Specialty contractors or insulation contractors are specialty contractors in the construction industry whereby our agreement with our unions supposedly binds them to work only for established insulation contractors.

**TRIAL EXAMINER:**

Did Mr. Baker at any time tell you exactly what he wanted you or the other contractors to do in order to have the men apply these fittings or whatever you want to call them?

**THE WITNESS:**

Yes, sir.

**TRIAL EXAMINER:**

What was that?

**THE WITNESS:**

Put union labels on them.

**TRIAL EXAMINER:**

And to put union labels on them you would have to have them fabricated by union men, is that correct?

**THE WITNESS:**

Yes, sir, and most of them were.

\* \* \* \*

**[68] TRIAL EXAMINER:**

From the time that you — it was Mr. Graham or the foreman told you that the men would not

install these fittings, until September 13 or shortly thereafter, were the fittings actually installed?

THE WITNESS:

No, sir.

TRIAL EXAMINER:

They were not until after an injunction was obtained?

THE WITNESS:

That's right, sir.

\* \* \* \*

[69] MR. DEAKINS:

Would you mark that as Charging Party's Exhibit 1, please?

(The document above-referred to was marked Charging Party's Exhibit No. 1 for identification.)

### DIRECT EXAMINATION

Q (By Mr. Deakins) . . .

\* \* \* \*

Q Now, do you know when the shipments were made to you from Thorpe Products Company? A How many? I mean —

Q I think there was testimony that there were two shipments, one on the 2nd and one on the 6th of Au-

gust. Is that

[70] correct? A That sounds correct, yes, sir.

Q And did your people pick those up, themselves? A I couldn't say. I don't know.

# TRIAL EXAMINER:

The testimony was that they were picked up by Armstrong.

Q (By Mr. Deakins) Now, handing you what has been marked as Charging Party's Exhibit 1, which is a document entitled "Memorandum of Agreement," state if you can what that is. A This is the agreement between the Houston Insulation & Contractors Association and the International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 22.

Q I notice that on this agreement your name appears as Secretary and Treasurer of the Houston Insulation & Contractors Association, is that correct?

A Yes, sir.

Q And is this a copy that was furnished by you for the purposes of this testimony today? A Yes, sir.

Q And is it a correct copy? A Yes, sir.

Q The names, of course, the signatures are printed in there, otherwise —

# MR. DEAKINS:

[71] A Yes, sir.

Q — it is a copy that is in use, is that right? A Yes, sir.

Q Are you familiar with the provisions of this agreement, Mr. Foster? A Yes, sir.

Q I want to refer you now to Article VI, and also to Article XIII of this agreement —

\* \* \* \*

[72] Q (By Mr. Deakins) You are familiar with those, I take it? A Yes, sir.

Q Now, did you have any function in the negotiation of this agreement? A Yes, sir, I was a member of the Negotiating Committee.

Q Who else was on the committee? A R. A. Stapleton and Granville Drowns.

Q Now, who represented the union? A Mr. Baker, Mr. Schrode. I think the other member was Mr. Mooney.

Q Mr. Mooney. His name appears as President. A Yes.

Q And it wouldn't be unlikely.

Did you have any occasion to discuss any particular agreements, sections or articles, rather, of this agreement with Mr. Baker during the negotiations?

A Yes, sir.

Q What ones in particular did you discuss with him? A Well, in negotiating this present agreement we discussed every article, but one in particular that we objected

[73] to was Article VI.

Q Now, what was the nature of your objection?

MR. SICKLES:

Well, I will object at this point. We have a document before us that speaks for itself.

**TRIAL EXAMINER:**

Yes. You have a contract and a meeting of the minds. I am not going to go behind the contract.

**MR. DEAKINS:**

Mr. Examiner, the United States District Court up here permitted this testimony for the very simple reason that representations were made by the union in connection with this Article VI which bears on the interpretation of it placed on it by them, and that is what I propose to prove by this witness, and if the Examiner wants to deny it, I will make a formal offer of proof.

\* \* \* \*

**[74]** Q (By Mr. Deakins) Let me ask this question:

Did Mr. Baker make any statement to you people who were in the meeting with reference to the intention of the Asbestos Workers Union to organize production workers in other plants?

**[75]** A Yes, sir.

\* \* \* \*

Q (By Mr. Deakins) All right. What did Mr. Baker state with reference to those intentions?

\* \* \* \*

A I can't remember his exact words, but they were to the extent that they did now have some production workers locals, and that they hoped to get more of them.



**Q** (By Mr. Deakins) Now, where were these production workers locals, where were they performing their work?

**MR. DEAKINS:**

Mr. Examiner, I would like to make a formal offer of proof that if this witness were permitted to testify he would testify that Mr. Baker was called in

**[76]** to talk about the labels, and that he stated that he had just gotten back from an International meeting and that he told the members of the Association that the International intended to organize what they called the production worker in every plant where they could do it, and the members of the Association asked him if the Asbestos Workers had these production workers, and he stated yes, that they had them at three plants, one at Barberton, Ohio, and one at Owens-Corning, Kansas, at Kansas City, and one in some other place, and that the production worker was supposed to work in a manufacturing plant and make all types of insulation products, and the witness would so testify if he were permitted to.

**TRIAL EXAMINER:**

I will reject the offer of proof on the grounds that it isn't relevant to the specific issues of this pleading, which were very clear and very specific.

**[77] MR. SICKLES:**

Well, I will offer what has been marked as Charging Party's Exhibit 1 in evidence as the International's Exhibit 1.

**TRIAL EXAMINER:**

It will be received. I want it in.

(The document above-referred to, heretofore marked Charging Party's Exhibit No. 1, was received in evidence.)

### CROSS EXAMINATION

**Q** (By Mr. Sickles) Mr. Foster, you testified that you have for some time now purchased insulation materials from the Thorpe Company? **A** Yes, sir.

**Q** This has included, has it not, straight line pipe?

**A** Yes, sir.

**Q** And has there been any union decals or union labels on those?

**[78] A** Not to my knowledge.

**Q** And they have been applied? **A** Yes.

**Q** To your knowledge have you purchased any of them in the last three months prior to September 13?

**A** Yes.

**Q** And have they been applied? **A** What are we talking about?

**Q** Straight line pipe covering. **A** To my knowledge they have been, yes, sir.

Q All right.

You purchased some mitered fittings from Thorpe, you testified. When you have a project, or let's take the Lummus project in Victoria, how many, roughly how many fittings were there to be covered on that project? A I couldn't give you a specific count. It's over a truckload.

Q Did you have any of your employees working for you mitering fittings? A Yes, sir.

Q Where? A In our shop in Houston.

Q All right.

And were they applied? A No, sir.

[79] Q None of them were applied? A None of them were applied.

Q And why were they not applied?

MR. DEAKINS:

I object to that.

TRIAL EXAMINER:

If he knows.

Q (By Mr. Sickles) Well, if you know. A Because they didn't have the union label on them.

Q All right.

TRIAL EXAMINER:

Do you withdraw the objection?

MR. DEAKINS:

Yes, I do now.

Q (By Mr. Sickles) Do you purchase that which we referred to earlier as a pre-molded fitting? Have you ever had occasion to purchase any of those? A A pre-molded fitting?

Q A pre-molded fitting. A Yes.

Q A manufactured fitting. A Some of those were sent to the job.

Q And from whom were they purchased? A Pam-Rod.

Q Pam-Rod? A Company.

Q And if you know, do they have a union label on them? A Not to my knowledge.

Q Were they applied?

[80] A Yes, sir.

Q By individuals working under the jurisdiction of Local 113, under the contract? A What are you saying?

Q In Victoria. A They were applied? Yes, yes.

Q All right.

You indicated that Mr. Baker made a statement that he was concerned with the fact that these hadn't been fabricated by union men, in this correct? You made that statement on direct examination, I believe.

A That he was concerned with the fact that —

Q That — well, let me rephrase the question. A All right.

Q That there was a desire to have union labels or union decals placed on mitered fittings to assure that they had been fabricated by union men. A Yes, sir.

Q Is it not a fact over the course of the years you have had a number of employees working for Armstrong who were covered by the collective bargaining agreement who were not union men?

TRIAL EXAMINER:

If you know.

A Yes.

Q (By Mr. Sickles) Yes, you have?

\* \* \* \*

[81] Q (By Mr. Sickles) Without specific reference to this job, have you over the course of the years mitered fittings with your own employees? A Yes, sir.

Q And have they been applied? A Yes, sir.

Q Is it not the fact that the great majority of the mitered fittings that you have requested employees to apply have been applied?

MR. DEAKINS:

I object to this as immaterial, this past history, Mr. Examiner.

MR. SICKLES:

They are trying to show a conduct or course of conduct.

TRIAL EXAMINER:

I will allow him to show a course of conduct.

A Yes, they have been applied.

TRIAL EXAMINER:

All I am interested in, are the fittings that weren't applied, of course.

Q (By Mr. Sickles) If you know, the fittings that were purchased by Thorpe in the instant case, were they any different than the — the end result any different?



**[82] TRIAL EXAMINER:**

Purchased by Thorpe or purchased by Armstrong from Thorpe?

**MR. SICKLES:**

From Thorpe, I am sorry, from Thorpe.

**Q** (By Mr. Sickles) Were they are different, the end product, from the fittings that your employees fabricated in your shop? **A** No, sir.

**Q** All right.

Then if you as a matter of course fabricate them in your shop why did you purchase them from Thorpe in this instance? **A** I think it's common practice to ship or make fittings when your shop is running for a large project, to make them, ship them down there, and if your shop is not running, when engineering changes come along, we buy them, or if it's running we make them.

\* \* \* \*

**[83] Q** You purchase from Thorpe on occasions straight line pipe covering? **A** Yes, sir.

**Q** And have your people miter it and make a pre-fab fitting, a mitered fitting? **A** Right.

**Q** And in this particular case instead of buying the straight line pipe covering you purchased a mitered fitting which is straight line pipe covering that has been mitered? **A** That has been manufactured —

**Q** Right. **A** — into a — yes.

**TRIAL EXAMINER:**

Yes.

Q (By Mr. Sickles) Well, you said manufactured. This is not done by a machine, is it? A It is in our shop.

TRIAL EXAMINER:

The testimony is it was done by a saw, according to the testimony.

THE WITNESS:

It's a very special type saw. It's a very expensive type saw.

Q (By Mr. Sickles) So that certain labor which would normally be performed by your employees were they to miter these on the job site or in your shop, you purchased from Thorpe, is that correct? A I didn't purchase the labor. I purchased the  
[84] manufactured product.

Q You purchased a product that was a mitered fitting, which had labor performed on it —

TRIAL EXAMINER:

It had been cut up and sliced in the Thorpe shop?

THE WITNESS:

Yes.

TRIAL EXAMINER:

On other occasions it might have been purchased in the bulk and cut up in your shop. We understand that.

THE WITNESS:

O. K.

Q (By Mr. Sickles) All right.

When you signed Charging Party's Exhibit No. 1,

the contract, you recognized that this prohibited subcontracting of labor, did you not? A That is correct, at the job site.

\* \* \* \* \*

[85] Q (By Mr. Sickles) Mr. Foster, you made reference to certain meetings held by yourself, other members of the Houston Insulation Contractors and certain officials of Local 22. First of which was on June 3rd. A Yes, sir.

Q All right. Was there any representative of Local 113

[86] there? A No, sir.

Q All right.

Now, you discussed the question of application of these mitered fittings at that meeting? A Yes, sir.

Q And you stated that Mr. Baker primarily, the corresponding secretary of Local 22, made certain statements that there had to be union decals placed on those fittings. A Yes, sir.

Q And you stated that this was to assure that union men had worked on these fittings? A Yes, sir.

Q I ask you this question, is it not the fact that at those meetings Mr. Baker stated that they desired union decals as a question of identification to know whether or not these fittings had been mitered by employees of Armstrong? A No, he didn't clarify that to that point.

\* \* \* \* \*

[188] Q (By Mr. Sickles) Did you not state in answer to a question that I asked you in the United States District Court here in Houston as to whether or not Mr. Baker did not state at that meeting that he was concerned, wanted decals as identification to see or assure that the products were mitered under the terms of the agreement, and your answer to that was, "I don't recall Mr. Baker's words," with reference to this meeting? A Are you telling me that is what my answer was?

TRIAL EXAMINER:

No, he is asking you if that was your answer. He is not telling you what your answer was.

Q (By Mr. Sickles) I ask you more specifically if you did not say "I can't remember his wording back that far, no"? A That was my answer to your question.

Q All right.

Now, today are you telling us you can remember Mr. Baker's wording? A No, I just said that.

TRIAL EXAMINER:

He just said he couldn't remember —

A I said I couldn't remember exactly what he said.

\* \* \* \*

[189] It is your statement that you do not remember what Mr. Baker said at that meeting specifically?

TRIAL EXAMINER:

With respect to Armstrong.

A Specifically to Armstrong. You rephrased the question just now.

**TRIAL EXAMINER:**

You asked him if Mr. Baker did not tell him at that time that he wanted the decals on these fittings to show that they were made by Armstrong employees. And he said he didn't remember that portion of the conversation.

**THE WITNESS:**

That's right.

Q (By Mr. Sickles) Well, do you remember at this point that Mr. Baker specifically stated that this was with reference to union men? Is that your present recollection?

**TRIAL EXAMINER:**

This was with reference to his reasons for wanting decals on the material.

**THE WITNESS:**

Right.

**TRIAL EXAMINER:**

You do recall that he said he wanted that so it would identify the fact that union men had been employed, is that correct?

That is my understanding of your previous testimony.

**MR. SICKLES:**

That is my understanding of his testimony.

**THE WITNESS:**

That's right.

Q (By Mr. Sickles) And you are stating that he did

[90] specifically state that? A Yes, sir.



**MR. SICKLES:**

Well, I would, then, Mr. Examiner, like to read a series of questions and answers to the witness and ask him if he did not so testify in the District Court case.

\* \* \* \*

[91] A "QUESTION: I ask you if it was not identification as to whether or not it had been made under the terms of the agreement. Was that not specified to you by Mr. Baker?

"I can't remember his wording back that far, no."

\* \* \* \*

[97] CROSS EXAMINATION

Q (By Mr. Mitchell) Mr. Foster, you were present when Mr. Frank Sheldon testified this morning, weren't you? A Yes, sir.

Q Did you hear him, his testimony to the effect that he, as far as his memory was concerned, had only sold mitered fittings to your company on just this one occasion? A I heard him say that, yes.

Q Are you prepared to tell the Hearing Officer here for this record that your memory differs from his in this respect and that you have bought mitered fittings from Armstrong on more than one occasion? A From Armstrong?

**TRIAL EXAMINER:**

No, from Thorpe.

Q (By Mr. Mitchell) From Thorpe. A I don't know what our records reveal in that respect. I do

know that we have purchased other pre-formed materials from them, or prefabricated, prefabricated, I am sorry.

\* \* \* \*

[100] Q And isn't it true, Mr. Foster, that Mr. Eaton told you at that time that they weren't being applied because they couldn't tell who had mitered or manufactured these? A No, that is not true.

Q That is not true.

Didn't he in fact tell you that if your company, Armstrong, could show them, show the insulators down there on the job and him, that if these fittings had been mitered or manufactured by Armstrong, that they would apply them? A Yes, sir.

Q He told you that, didn't he? A And we gave him that proof in the form of a letter, and they still refused to apply the fittings. He told me that he couldn't allow his men to apply the fittings because he had orders from the International.

Q And so in response to that meeting, Mr. Foster, your company wrote Mr. Eaton a letter, is that true?

A Yes, sir.

Q And in that letter you stated that these mitered

[101] fittings on the Victoria job had been manufactured by employees of Armstrong? A When that letter was written that was true.

Q Is that right? A Yes, sir, and they still refused to apply them.

\* \* \* \*

[102] Q (By Mr. Mitchell) Mr. Foster, didn't you previously testify that the latter part of June some mitered fittings were sent to the Victoria job? A Yes, sir.

Q But that those fittings were all manufactured by Armstrong? A That's right.

Q And then is it your testimony that at a later time the mitered fittings were purchased from Thorpe and sent to the job? A Yes, sir.

Q And what was that date, approximately? A We purchased fittings from Thorpe and Pam-Rod both the first week in August or the last week in July. I have forgotten. I had the purchase orders here previously.

\* \* \* \*

Q One final thing. At this meeting with the business agent of Local 22, Mr. Schrode, and I think Mr. Baker was there too, at the Houston Engineers Club — A Uh-huh.

[103] Q — when the question of applying decals was brought up — A Yes, sir.

Q — applying decals to these manufactured or fabricated materials was brought up, did not Mr. Schrode, as well as Mr. Baker, tell you at that meeting that they weren't married to the decals, and that they would consider any other form of identification? A That's correct, and we furnished it, and they still wouldn't apply our fittings. All we want to know is how to get them applied.

Q Then isn't it true that the sense of the meeting between Mr. Schrode and Mr. Baker and yourself at the Houston Engineers Club was the matter of identifying who made the manufactured or the mitered

product? A That's right, and we furnished that identification in the form of a letter.

Q That is, identification from the company point of view? A Yes, sir.

Q All right. A And that in the past, that had always been sufficient.

Q I am not sure that we are on the same wave length, perhaps, Mr. Foster. A All right.

Q Let me repeat the question, if I may.

[104] You have already testified that at this meeting between Mr. Schrode and Mr. Baker and yourself at the Houston Engineers Club —

TRIAL EXAMINER:

There were two meetings at that club, at the Engineers Club, weren't there?

THE WITNESS:

Yes, sir.

TRIAL EXAMINER:

We better get the right meeting.

MR. SAFOS:

One on the 3rd, and one on the 16th, I believe.

TRIAL EXAMINER:

That's right.

Q (By Mr. Mitchell) Let's talk about the June 3rd meeting first. That was — A Yes, sir.

Q At that meeting the application of these labels to prefabricated fittings was discussed, was it not?

A Yes, sir.

Q And I think you have testified that the union's position was that they wanted the decals to be placed

on these mitered fittings or prefabricated fittings at that meeting? A Yes, sir.

Q And at that meeting, same meeting, they told you that they weren't married to the decals, the decal method of identification, isn't that true? A Yes, sir.

Q That they would consider any other method of identifying

[105] who made the product, isn't that true? A Yes, sir, that's right.

\* \* \* \*

#### TRIAL EXAMINER:

Did Baker tell you why he wanted these products identified regardless of the method of identification used?

#### THE WITNESS:

To assure that they were made by their people.

#### TRIAL EXAMINER:

That is what I thought.

Q (By Mr. Mitchell) Now, Mr. Foster, I had previously understood, maybe it's my fault, but I want to get this one thing clear, if we can.

Wasn't one of the purposes of identifying the product

[106] or putting the decal or other identification mark on the mitered fittings, to determine which manufacturer had in fact, which company had in fact mitered that fitting?

\* \* \* \*



A I don't know.

[108]

C. E. FOSTER

TRIAL EXAMINER FUNKE:

You are still under oath.

What I wanted to ask you, Mr. Foster, when Armstrong cut its own mitered fittings, where did it perform that work?

THE WITNESS:

In our shop, in the Houston warehouse.

### FURTHER CROSS EXAMINATION

Q (By Mr. Sickles) This was merely a matter of convenience, though, to you, was it, so you wouldn't have to move the saw? A It's our mode of operation, yes sir.

Q But there is no reason this work could not be done at the job site? A It would be some inconvenience, yes, because —

Q Because of the moving of the saw? A Because of the largeness of the saw and it's a special, expensive type piece of machinery.

Q If you did not use the saw and used a handsaw or have you ever used a handsaw operation? A Years ago, yes sir.

[109]

Q And where was that work done? A In the field.

Q On the job site? A Uh-huh.

## REDIRECT EXAMINATION

Q (By Mr. Safos) Mr. Foster, is this doing of fittings, mitered fittings on the job site, is this a regular procedure insofar as Armstrong is concerned or insofar as the insulation industry in this area is concerned? A It's not a regular procedure any more in this area, particularly at Armstrong.

Q And how is it accomplished? A Most of the shops, most of the contractors have their own shops in their warehouses to miter these fittings.

## RECROSS EXAMINATION

Q (By Mr. Sickles) But this is the same work, done by the same type of an employee, who could do this with a handsaw on the job site, it's the same mechanics, the same wage rate, et cetera? A That's right, I mean, just improved methods is what it amounts to.

Q It's just a convenience to you so you don't have to move that expensive saw around? A Right.

TRIAL EXAMINER:

Thank you.

\* \* \* \*

[111]

LYNN WILLIAMS

was called as a witness by and on behalf of  
the General Counsel . . .

\* \* \* \*

**TRIAL EXAMINER:**

Give your name to the reporter, name and address to the reporter, please.

**THE WITNESS:**

Lynn Williams, 2122 DuPont Drive, New Orleans.

**DIRECT EXAMINATION**

Q (By Mr. Safos) Mr. Williams, by whom are you employed?

[112] A Armstrong Contracting and Supply Corporation.

\* \* \* \*

**TRIAL EXAMINER:**

Were you in charge or superintendent over what we have referred to as the Victoria Project?

**THE WITNESS:**

Yes sir.

\* \* \* \*

[114] Q You mentioned Mr. Robert Graham. What was his position

[115] on this job? A He was foreman, general foreman of this job, this project.

Q Over what employees, please, sir? A Over the asbestos workers, Local 113, insulators.

Q Was he the general foreman? A Well, I would

classify him as the general foreman because he had one sub-foreman under him.

\* \* \* \*

[117] Q What did he tell you? A He was a member of 113, International Association of Heat and Frost Insulators and Asbestos Workers.

Q Respondent Local 113? A 113, correct.

Q How many Armstrong employees, that is, insulation employees, worked on the du Pont Project? A Well, at the time I left, at that particular time, there was around between fourteen and sixteen.

Q Is that with the exception of Mr. Graham? A That would be with the exception of Mr. Graham, yes.

Q To your knowledge to what labor organization, if any, did these employees belong? A Well, they were supposed to have belonged to 113.

\* \* \* \*

[118] Q (By Mr. Safos) Well, they were hired, were they not, by Mr. Graham? A Yes, under my supervision. There were several — there was one I know of definitely that was not. He was a so-called helper that said he did not belong to Local 113.

Q He was not a member, you say he was not a member of Local 113? A No sir, he wasn't, according to what he said.

\* \* \* \*

Q (By Mr. Safos) Now, will you please tell us whether or not Mr. Graham discussed with you any

problems regarding insulation work on the du Pont Project? A Well, we had quite a few problems, but the biggest problem was the application of these mitered fittings.

Q Well, let's start off with some dates, please, sir.

A Well, this would probably, if I remember correct, would be the latter part of June or the first part of July.

Q Of this year? A Of this year.

Q All right. Tell us about these discussions. Were they on the project site or not?

[119] A They were on the project site, right, when I made my regular job site visits.

\* \* \* \*

[120] THE WITNESS:

Well, he informed me that these fittings would not be applied, and he was informed by Mr. Eaton, business manager of Local 113, that these would not be applied unless they had union decals.

Q (By Mr. Safos) Was there anything else to the conversation? Did Mr. Graham state to you what would transpire or what would happen in the event they were applied? A If any of the fittings that were applied were applied without union decals a membership, whoever applied them, would be charged formally before the Executive Board or some other charge.

\* \* \* \*

[121] A Well, at the first discussion it was just Mr. Graham and myself, but then we immediately contacted, made contact with Mr. Eaton, in



which this was discussed with Mr. Eaton.

Q When was this? A The exact date I can't say.

Q It was after the conversation, was it not, with Mr. Graham? A It was after the conversation with Mr. Graham.

A Mr. Eaton came over to our project where we discussed this, and he formally told me that the fittings would not be applied unless they had union decals, union labels.

[122] Q Were there any further conversations on the project site with Mr. Eaton? A Yes, there was. Mr. P. S. DeQuir's office, the project manager for Lummus Corporation, Mr. Foster, myself, Mr. Eaton and Mr. P. S. DeQuir, where this fitting situation was discussed, and as Mr. Foster stated earlier, it came to an abrupt halt, and outside — after this meeting was over, outside Mr. Eaton informed us the situation was as it stood before, that the fittings wouldn't be applied.

Q I believe you already testified that the mitered fittings at least were not applied at that time. A They were not.

[123] CROSS EXAMINATION

Q (By Mr. Mitchell) Mr. Williams, I think you were probably here this morning, too, when you heard

Mr. Sheldon of the Thorpe Company say that these mitered fittings that we are talking about here today, and which gives rise to this charge, were purchased by Armstrong on only one occasion.

Now, I want to ask you — you heard that, did you not? A Yes, I heard that.

Q I want to ask you this question.

From your years with Armstrong, are you able to contradict that statement in any way? A No, I am not able to contradict that statement. It was just one occasion that we had bought them from Thorpe. They have bought prefabricated fittings from other companies.

MR. DEAKINS:

Just a minute. Could I have the last of that answer?

MR. MITCHELL:

Well, the last part of it was unresponsive.

MR. SAFOS:

Well, let's hear it.

THE WITNESS:

In this particular case, one or two cases, like I said, I was on vacation at the time, I don't know whether it was one occasion or two occasions, they were manufactured, they were bought from Thorpe, but there had been fittings bought from other manufacturers of fittings.

TRIAL EXAMINER:

The gist of it was he said he couldn't contradict the testimony of the representative from Thorpe.

**[124]** Q (By Mr. Mitchell) Now, Mr. Williams, were you aware that on this particular job at Victoria your company, Armstrong, had purchased manufactured fittings from Pam-Rod? A Yes, I was aware of that after I came back off of my vacation.

Q And those manufactured fittings were applied by Armstrong's employees, were they not? A That is correct, the molded fittings.

Q No question was made about those? A No, no question whatsoever.

Q Now, in your meetings, and you have testified that there were at least two that took place between yourself and Mr. Graham, the job foreman, and Mr. Eaton, the business agent — A Right.

Q — for 113, in those meetings isn't it a fact, Mr. Williams, that Mr. Eaton was primarily concerned with who had manufactured these mitered fittings, that is to say, wasn't his inquiry directed to whether or not Armstrong had prefabricated these mitered fittings or whether some other contractor, such as Thorpe, or somebody, had manufactured these fittings? A All I know, they were concerned with whether they had union labels on them.

Q You don't remember Mr. Eaton directing his inquiry or asking you or trying to seek information about who had

**[125]** manufactured or who had made these mitered fittings? A Not the ones that were bought from Thorpe. The ones that we manufactured, myself, I told him who had made them.

Q There was some discussion, then, I take it, Mr. Williams, between you and Mr. Eaton as to who manufactured these mitered fittings? You all talked about that? A Yes, we did talk about that.

Q And you told him or let me ask you, did you or not tell him that these mitered fittings that the men were refusing to work with were in fact manufactured by Armstrong? A That is correct.

Q And he, on the other hand, or let me ask you whether or not he was maintaining, that is, Mr. Eaton was maintaining that they had been manufactured by somebody other than Armstrong? A No, I don't recall—all I can—I informed him that—he asked me who they were made by, and I told him who they were made by, they were made by Armstrong in our shop.

Q And then was it subsequent to that or do you know that Armstrong wrote Mr. Eaton and assured him in letter that these mitered fittings down there were in fact manufactured by Armstrong and not by anybody else? A Yes, a letter was written to that effect.

【126】

# CROSS EXAMINATION

Q (By Mr. Sickles)

【127】

Q Over the years that you were in this particular area, and had employees working under the collective bargaining agreement, either with Local 22 or 113, did you have occasion to have employees who were not members of either union? A Yes.

Q Did Mr. Eaton ever tell you why he felt that decals had to be present on the fittings? A So far as I know, he —



Q Did he ever tell you?

**TRIAL EXAMINER:**

Did he ever tell you? Can you remember  
[128] what he said?

**THE WITNESS:**

Yes, he said they couldn't apply them because they didn't have the union labels and there was pressure from above.

Q (By Mr. Sickles) No, I understand what your testimony is. A He was following orders.

Q But did he ever tell you why, what the purpose of having the union decals was? A No, I don't think he ever explained that to me.

\* \* \* \* \*

**EDWIN E. ROBERTS**

was called as a witness by and on behalf of the General

[129] Counsel

\* \* \* \* \*

**DIRECT EXAMINATION**

Q (By Mr. Safos) Mr. Roberts, by whom are you employed? A Johns-Manville Sales Corporation.

Q In what capacity? A Contract manager.

Q And how long have you been contract manager? A Approximately three years.

Q Mr. Roberts, what is the business relationship between Johns-Manville and Techalloy Company, In-



corporated of Houston? A Techalloy is one of our suppliers of accessory materials.

Q What kind of materials, please, sir? A Accessory.

Q Accessory? A Uh-huh.

Q What do you put in the classification of accessory materials? A Stainless steel bands, stainless steel wire, tie wires.

Q To your knowledge as contract manager how long has this relationship, business relationship, existed?

[130] A Well, ever since I was contract manager, I know that it has existed.

Q That is at least for three years? A Yes, uh-huh.

Q What is the nature of the construction work engaged in for American Oil Company in Texas City, Texas? A We are applying insulation to the ammonia barge piping job at American Oil Refinery at Texas City.

Q Your job is applying the insulation? A Yes, sir.

Q What materials do you use in this application?

A Under the pipe we apply, we are applying Polyurethane insulation, two inches thick, and covering it with galvanized metal and the attachments on the original specifications was stainless steel bands to apply the pipe, to attach the pipe covering, and stainless steel bands to attach the jacketing.

Q Now, these stainless steel bands, from whom were they purchased? A They are purchased from the Techalloy Company.

**TRIAL EXAMINER:**

When did this purchase take place, do you recall?

**THE WITNESS:**

Well, I have a copy of the purchase orders in my brief case, if you would like for me —

**TRIAL EXAMINER:**

No, do you remember the month?

**THE WITNESS:**

I believe it was June sometime, I believe.

**[131] TRIAL EXAMINER:**

And they were delivered to the job site or you picked them up?

**THE WITNESS:**

No, they were delivered to our warehouse.

**TRIAL EXAMINER:**

Then what happened?

**THE WITNESS:**

We started applying seals to the bands in the warehouse with an asbestos worker whose name is Robert Oliver, and he stopped seals on them because he said he couldn't — that Joe Schrode had told him not to put the seals on them because he couldn't apply decals or labels to the bands because they had been cut by a person other than a Local 22 or asbestos worker, not Local 22.

**TRIAL EXAMINER:**

This is what this employee told you personally?

**THE WITNESS:**

That is correct.

\* \* \* \*

**[132]** Q Other than pre-cut stainless steel bands, were there any purchases made for this project made from Techalloy as to coil stock? A Yes, there was.

\* \* \* \*

**[133]** Q Mr. Roberts, who is the foreman for Johns-Manville on this American Oil, Texas City Project? A Clifford David.

Q And how long have you known Mr. David? A Approximately two years.

\* \* \* \*

**[134]** TRIAL EXAMINER:

Well, I am not going that far now because I don't have to. I will sustain the objection.

Q (By Mr. Safos) Has Mr. David told you whether he was a member of any labor organization? A He said he was.

Q What labor organization?

**[135]** A Local 22, Asbestos Workers.

Q Thank you.

Now, as contract manager for Johns-Manville, what is your relationship as a supervisor with Mr. David at the project site? A Mr. David is the foreman, and we have the field superintendent who is directly

— who he is directly responsible to, and the field superintendent is directly responsible to me.

\* \* \* \*

**[136]** Q (By Mr. Safos) Mr. Roberts, inform us whether or not Mr. David discussed with you at this project site any problems regarding insulation work. A Yes sir, he did.

**TRIAL EXAMINER:**

What did he say? What did he tell you the problem was?

**THE WITNESS:**

He told me that he could not apply these

**[137]** pre-cut bands to the insulation.

**TRIAL EXAMINER:**

Did he tell you why he couldn't?

**THE WITNESS:**

Yes, he did. He said that they did not have a label on them, and therefore he couldn't apply them, and he was told by Joe Schrode not to apply them, if they didn't come to the job with a label on them.

Q (By Mr. Safos) when was this conversation, please, sir? A I believe it was in — I can't remember the exact date. I believe it was early — I guess it was the last part of July or the first of August. I can't recall the exact date.

Q Was anyone present during this discussion? A Yes, Mr. D. G. Cheek, our field superintendent, was there.

Q Is that D. G.? A Yes, uh-huh.

**Q D. G. Cheek.**

**And is he field superintendent, you say? A Yes.**

**Q Did Mr. David inform you as to when he was advised by Mr. Schrode? A Yes, he said that he was attending a meeting —**

**TRIAL EXAMINER:**

**This is all hearsay as to the Respondent.**

**THE WITNESS:**

**He said he was at a meeting at Local 22, and that he was told not to —**

\* \* \* \*

**[139] Q (By Mr. Safos) Mr. Roberts, to your knowledge, have employees of Local 22 applied pre-cut stainless steel bands on any other projects? A I can't recall a project at this moment where stainless steel bands were applied, but there were aluminum bands, which are the same application.**

**Q What project were you having reference to as to aluminum bands? A The NASA Project where we applied aluminum bands to hold onto metal.**

**Q What is the difference in the bands we are considering? A The difference in the metal.**

**Q The difference in the metal, is that the only difference?**

**[140] A They both have a seal on them and they both attach the metal or the insulation to the line.**

**Q Would you please state whether or not coil stocks have regularly been cut on the job sites by insulators**



for installation on projects? A They have been cut on the job sites, yes sir, regularly.

Q I was asking you whether this was regular procedure.

TRIAL EXAMINER:

Is it customary to do it at the job site or don't you know?

THE WITNESS:

No, it's customary — this is hard to answer because there are so many types of pre-cut bands. It's customary if you are talking about pre-cut bands, to have them come in cartons.

TRIAL EXAMINER:

What we are really talking about is pre-cut stainless steel bands.

MR. SAFOS:

Yes sir.

Q (By Mr. Safos) I wonder, Mr. Roberts, do you have any of these pre-cut stainless steel bands? A Yes sir, I have some that we manufacture.

\* \* \* \*

[143] Q (By Mr. Safos) Did Mr. Schrode discuss with you problems concerning the application of insulation material on this project? A He discussed with me the application of these stainless steel bands.

Q Now, when was this discussion? A Well, this was after Clifford said that he couldn't put the bands on down at Texas City. I called him —

Q You mean this is David which you refer to as Clifford? A Clifford David, right.

Q All right. A After we found out they were going, not going to be applied, well, I came back and called Mr. Schrode and he said that that was right, the bands would not be applied because they were cut by someone other than asbestos workers, and

[144] that Robert Oliver could not affix labels or seals to the bands. Therefore, the bands would go to the job without seals on them, and they would not be applied, or labels.

\* \* \* \*

Q (By Mr. Safos) Who is Mr. Robert Oliver? A He is one of our employees that is a member of Local 22.

\* \* \* \*

[145] Q (By Mr. Safos) Mr. Roberts, what position, if any, do you hold with Houston Insulation Contractors Association? A I am secretary and treasurer.

Q And how long have you been in that capacity? A Since the first of 1963.

Q Do you recall having any discussion with Mr. Brooks Baker and/ or with Mr. Schrode? A Yes sir.

Q Will you tell us about these, please? A We had discussions — they were invited to attend our Association meetings.

\* \* \* \*

**TRIAL EXAMINER:**

The meetings in the Engineers Building,  
[146] right?

**THE WITNESS:**

Yes sir, that's right.

**TRIAL EXAMINER:**

All right.

A And we were discussing the application of labels to fittings and stainless steel, or any kind of materials fabricated, and we asked them why we were to put these labels on, and he said they were for identification purposes.

**TRIAL EXAMINER:**

Identification of what?

**THE WITNESS:**

That I am not quite clear on. I didn't understand it thoroughly in either case. But we objected to putting them on on the grounds that it increased our cost and it was an item that should be negotiated into the contracts.

Q (By Mr. Safos) Can you recall any further discussions? A Well, there was quite a great discussion at lengths. Is there any particular thing that we are referring to or do you want —

**TRIAL EXAMINER:**

All I am interested in is this business of the union label or the identifying mark on these fittings, whatever they are. That is all. I am not interested in your general discussions of policy.

A He said if these labels weren't applied, that the

workmen on the job wouldn't apply that particular item.

**TRIAL EXAMINER:**

But you have no clear idea of why? You didn't understand exactly why this would be required, this was to be required?

**[147] THE WITNESS:**

No, we didn't attempt to bring this up and it wasn't brought up by our organization, and so I have no knowledge of why.

\* \* \* \*

**[148] CROSS EXAMINATION**

\* \* \* \*

**[151] Q** And it's your testimony that there has been utilized in

**[152]** the Local 22 area bands with the use of a ratchet type tool, and have been used by, pre-cut, and have been used by members, by people represented by Local 22? **A** Yes sir, there has been.

**Q** On how many occasions? **A** Well, I can think of one large project right now.

**Q** And where was that? **A** NASA.

**Q** And if you know, was that information available to the officials of the local, that they were using the pre-cut band?

\* \* \* \*

A The officials of the local were on the job several times. I do not know whether they had knowledge.

Q All right.

Now, when bands have been brought, Techalloy bands have been brought to job sites, in coils, and they have been applied and cut by workmen under the jurisdiction of Local 22, has there been any objection to the use of these bands?

\* \* \* \* \*

[153] A Yes, sir, they have used them.

Q All right.

Do these coil bands, Techalloy bands, have a union label on them? A I don't believe so.

Q All right.

Do you know, only if you know, the reason that Local 22 desires decals or labels? A No, I don't have a clear understanding there.

Q All right.

\* \* \* \* \*

Q (By Mr. Sickles) Well, let me ask this, you discussed the meetings at the Engineers Club, there were two of them. A Yes, sir.

Q At one or both of these meetings did Mr. Baker ever state that Local 22 was not concerned primarily with union decals but any kind of identification would be acceptable? A Well, we had a means of identification before, and it was changed without our knowledge.



Q And what was that means of identification?

[154] A A shipping ticket from the company that listed the fittings that were purchased.

[155] Q (By Mr. Sickles) Back to the meeting that we were discussing, is it not true that Mr. Baker stated that they wanted a form of identification to show which contractor had prefabricated the particular work? A Well, I can't remember exactly. I know that it was a statement made that was similar to that, and exactly, I don't know.

[156] Q All right.

Let me ask you this, you testified, did you not in the injunction hearing? A Yes sir, that's right.

Q Do you recall that I asked you the question that I have just put to you, that Mr. Baker was concerned with identification or form of identification to show which contractor had been prefabricating the particular work and you stated that that was correct? A Well, as far as the exact wording, I can't say now, but the similar statement I agreed on, I am sure.

[157] REDIRECT EXAMINATION

Q (By Mr. Deakins) ...

**[158]**        Q Do you recall whether or not there was any discussion among the group whom you represent that is to say, the Houston Insulation Contractors Association, with reference to the application of decals to the materials that you would receive on the job? A Yes.

Q Who was that carried on with? A That was in both meetings, and this particular meeting that Mr. Baker was there by himself we had several jobs where fittings were not being applied.

Q Now, did you recall whether or not inquiry was made of Mr. Baker as to the reason for his asking for decals to be put on those materials? A He said that it was for a mutual benefit between the contractors and his asbestos workers, and that it would identify the workmen and the contractor who made these fittings.

Q It would identify the workmen and the contractor, as well, who made the fittings?

**[159]**        A Yes sir.

Q Now, did he distinguish between manufactured and fabricated fittings or not? A Yes, he said that; he distinguished molded fittings and machine-made fittings, as against mitered fittings, and he said he was referring to mitered fittings.

\* \* \* \*

**[162]**

H. CLIFFORD DAVID

was called as a witness by and on behalf of  
the General Counsel

\* \* \* \*

**TRIAL EXAMINER:**

Give your name and address to the reporter.

**[163] THE WITNESS:**

H. Clifford David, Route 1, Box 225, Magnolia.

\* \* \* \*

**DIRECT EXAMINATION**

Q (By Mr. Safos) Mr. David, by whom are you employed? A Johns-Manville.

\* \* \* \*

**[164]** Q (By Mr. Safos) Mr. David, are you a member of any labor organization? A Asbestos Workers Local 22.

Q How long have you been a member? A Twelve years.

\* \* \* \*

**[165]** Q (By Mr. Safos) Who is Mr. Joe Schrode? A He is business representative for Local 22.

Q Do you personally know him? A Yes, sir.

Q How long have you known him? A Ten years.

\* \* \* \*

**[166]** Q (By Mr. Safos) What discussions, if any, did Mr. Schrode have with you concerning his insulation work on this project? A Well,

he told me at the meeting on July 19th that he had heard those bands were already cut, and if they came to me without decals for me to refuse to put them on.

TRIAL EXAMINER:

What did you do as a result of this direction?

A And they brought the material down and the bands, and I looked the bands over and there wasn't no decal on them.

[167] THE WITNESS:

I went to Mr. Roberts and Mr. Cheek and I told them that I had to refuse to put his bands on, that I could not put them on, and he asked me why, and I said there wasn't no decal on them.

TRIAL EXAMINER:

Then you didn't put them on, is that correct?

THE WITNESS:

No sir. They brought me some coil stock.

Q (By Mr. Safos) Did you tell Mr. Cheek and Mr. Roberts of your instructions from Mr. Schrode?

A Yes, sir, I did. I told Mr. —

Q Go ahead. A I told Mr. Roberts that if he would contact Mr. Schrode and whatever Mr. Schrode told me to do, that is what I would do.

**[169] TRIAL EXAMINER:**

Well, I want to know what the purpose of a decal is. Does it tell you what company the product came from?

**THE WITNESS:**

If it's got a decal on it —

**TRIAL EXAMINER:**

Does that mean it's been done by union labor or what does it mean?

**THE WITNESS:**

No sir, not necessarily. If it's got a decal on it, I call my business agent and I give him the number off of that decal, and he tells me what specific shop cut it.

**[170] Q (By Mr. Deakins) Mr. David, that meeting you testified concerning, which took place on July 19, 1963, was a union meeting, was it? A Yes sir, it was.**

**Q Of the Asbestos Workers Local No. 22? A Yes sir.**

### **CROSS EXAMINATION**

**Q (By Mr. Mitchell) Mr. David, have you ever applied any steel bands that you had to cut, yourself, at the job? A Yes sir.**



Q Do you know that those steel bands come in a big roll, is that how — A Yes sir.

Q Has there ever been any difficulty about working with the steel bands that come in a roll that you take off?

\* \* \* \*

[171] A Being any difficulty?

Q Yes, have you ever refused to work on steel bands that have come to the job that are in a roll, that you have had to cut yourself? A No sir.

\* \* \* \*

Q (By Mr. Mitchell) Now, I want to ask you this, about a conversation that you have testified to for Mr. Safos, that you allegedly had with Mr. Schrode, I want to ask you specifically whether or not Mr. Schrode told you not to work on these, or work with these pre-cut steel bands, because they were made by non-union people? Did he tell you that? A No sir, he didn't.

Q What did he tell you?

[172] A At that time when I refused to put the bands on, I didn't know where they had come from, and I didn't know until all this went to court.

Q Did Mr. Schrode ever tell you why you were not to put, to work with these pre-cut steel bands? A No sir, he didn't.

Q All right.

\* \* \* \*

**[173]****C. E. FOSTER**

was recalled as a witness by and on behalf  
of General Counsel . . .

\* \* \* \*

**FURTHER CROSS EXAMINATION**

\* \* \* \*

**[174]****THE WITNESS:**

And because of the way materials are purchased and the purchase orders are filed in job files, the only way we can give you any information as to the amount of material purchased from Thorpe is through a commodity file with the value of material on it.

Now, 1962 our records indicate pipe covering materials in the amount of \$1,928.00, sundry materials in the amount of \$1,355.00.

**MR. DEAKINS:**

Does that mean purchased from Thorpe?

**THE WITNESS:**

Yes.

1963 records indicate preformed fittings in the amount of \$153.00. Prefabricated would be the better, that would be mitered —

**MR. SICKLES:**

Are you substituting that for preformed?

**THE WITNESS:**

Preformed, yes. Prefabricated fittings.

Prefabricated blankets in the amount of \$1,674.00.  
 Pipe coverings in the amount of \$295.00. And sundry  
 materials in the amount of \$180.00

\* \* \* \*

**[175]**      Q (By Mr. Mitchell) In 1962 you have indicated that you bought some pipe covering materials from Thorpe, but you can't tell us whether they were mitered or not? A Not unless you give me more time.

Q And in 1963 of those things that you just listed, can you tell what part of those were sent to the Victoria job that gives rise to this charge? A All of the prefabricated ells and part of these prefabricated blankets.

Q And what does that leave?

A That leaves pipe covering — now, sundries, I don't know how much of that was sent to Victoria.

Q Now, can you tell us from just that brief description of sundries whether or not that is in fact a prefabricated or a mitered fitting? A That could be a number of things, and I doubt that it would be. No, we would have that —

**TRIAL EXAMINER:**

You would have that-identified?

\* \* \* \*

**[176]**      Q (By Mr. Sickles) Mr. Foster, on the particular job in question that we have been discussing, you had your workmen prefabricate mitered fittings — A Yes sir.

Q. — and you purchased some from Thorpe? A Yes sir.

Q Would you tell us why you purchased certain ones from Thorpe? A We purchased certain fittings from Thorpe and Pan-Rod as fill-ins as we got engineering changes, because our shop was not in operation at that time.

Q There was nothing in the specifications of the job that required you to purchase these from Thorpe? A There is nothing in the specifications that requires us to purchase them from anyone.

Q All right.

[177] So that your purchase from Thorpe was not directed by the customer? A No sir.

Q Or the general contractor? A It's our prerogative.

Q It's your prerogative? A Yes sir.

\* \* \* \*

[178]

BROOKS BAKER

was called as a witness by and on behalf of the Respondent International . . .

\* \* \* \*

TRIAL EXAMINER:

Give your name and address to the reporter, please.

THE WITNESS:

Brooks Baker, 810 Grove, Deer Park, Texas.

## DIRECT EXAMINATION

Q (By Mr. Sickles) What is your occupation, Mr. Baker?

[179] A I am secretary of the Asbestos Workers Local 22 and vice president of the International Association.

Q Now, are they two separate labor organizations?

A Well, the International is the parent body.

\* \* \* \*

Q (By Mr. Sickles) How long have you been secretary of Local 22? A I am in my thirteenth year.

Q And how long have you been International vice president? A I am in my seventh year.

Q And how long have you been a member of Asbestos Workers Local 22? A I am in my twentieth year.

\* \* \* \*

[180] Q (By Mr. Sickles) Has your local instructed its members not to use the products of Thorpe? A Yes.

Q All right. Under all circumstances? A Yes, as far as I know.

Q Is the same true with Techalloy? A Yes.

Q Under all circumstances? A As far as I know, yes.

[181] Q All right.



And why have you instructed your local members to take those positions? A We are not in agreement with Thorpe or Techalloy.

Q Well, perhaps you misunderstood my question, Mr. Baker.

Let me rephrase it.

TRIAL EXAMINER:

You mean you have no contract with them?

THE WITNESS:

No contract, no.

Q (By Mr. Sickles) Have you instructed your members not, who are employees of Armstrong, not to handle certain or use certain products of Thorpe?

A Yes.

Q And why have you done that? A It would be a violation of our working agreement.

MR. DEAKINS:

I object to that as a conclusion of the witness.

MR. SICKLES:

I am asking for the position of the local.

TRIAL EXAMINER:

This is his reason, whether he is right or wrong on it.

MR. SICKLES:

This is correct.

TRIAL EXAMINER:

This is his stated reason for taking this action.

Q (By Mr. Sickles) All right. Then your action was —

**TRIAL EXAMINER:**

I am not going to find that it is a  
**[182]** violation just on his statement.

**Q** And what section of the agreement?

**A** Article VI and VIII.

**Q** And in what manner do you feel that it would be a violation of the agreement?

**MR. DEAKINS:**

Now, I object to this as asking for a conclusion of the witness.

**TRIAL EXAMINER:**

Now, he has testified that he believes that it was a violation. Now, he has certainly then got to be able to testify as to why he believes the contract was violated. He can't just —

**MR. DEAKINS:**

I think he is interpreting the contract, Mr. Examiner. The contract speaks for itself.

**TRIAL EXAMINER:**

Oh, I agree with you there. When I am ruling on that, I am not going to go by his interpretation of the contract. This is as to his motive.

\* \* \* \*

**[183]** **Q** (By Mr. Sickles) You have indicated that the Local's position is that it's a violation of the agreement. I ask what section. **A** Section VI and XIII.

**Q** O. K. Fine.

Now, have you instructed members of your Local working for Johns-Manville not to handle pre-cut Techalloy bands? A Yes.

Q And why? A Violation of the contract.

Q Same violation? A Same violation.

Q Have you at any time instructed your members not to handle any products based on whether or not union men worked on the products? A No.

Q Have you instructed the employers of the alleged violation, Armstrong and Johns-Manville?

MR. DEAKINS:

I object to that question.

Q (By Mr. Sickles) I am sorry. Advised them.  
A Advised them, yes, I have.

TRIAL EXAMINER:

The question has been rephrased.

Q (By Mr. Sickles) The question was have you advised the employers of the alleged violation? A Yes.

[184] Q All right.

With reference to both Techalloy and Thorpe?

\* \* \* \*

Q (By Mr. Sickles) I have in my hand, Mr. Baker, that which we have referred to today as a mitered fitting? A Right.

Q Do you agree with that description? A Yes, prefabricated.

Q Prefabricated.

And to your knowledge and your years in the trade, how has traditionally this end product come about?

A It's done by cutting miters from a half section of pipe covering.

Q By whom? A By the asbestos workers.

Q All right.

People covered by the collective bargaining agreement, coming under the jurisdiction of our —

\* \* \* \*

[185] THE WITNESS:  
Trade, Asbestos Workers'.

\* \* \* \*

[186] Q (By Mr. Sickles) Mr. Baker, if Armstrong is performing a job and they use fittings that are mitered by employees of Armstrong, do you issue any instructions to your employees not to handle it?

\* \* \* \*

A No.

\* \* \* \*

Q (By Mr. Sickles) Suppose the mitering is done by employees of Armstrong who are not members of Asbestos Workers Local 22?

TRIAL EXAMINER:

Have you issued instructions not to handle the product, is that the —

MR. SICKLES:

Yes, it's an Armstrong job, and they  
[187] bring onto the job mitered fittings.

Q (By Mr. Sickles) Now, first, these mitered fittings were not mitered, prefabbed, by members of your local. Would you issue any instructions, have you issued any instructions to your men not to handle them? A No.

TRIAL EXAMINER:

Well, there would be no way for you to know whether or not the Armstrong fittings were made by the Armstrong union members, or would you know it?

THE WITNESS:

Not necessarily.

TRIAL EXAMINER:

All right.

Q (By Mr. Sickles) All right. Let's assume that you knew, suppose they were made in another part of the country by employees of Armstrong who were not members of any local of the Asbestos Workers. Have you issued instructions not to handle them? A No.

\* \* \*

Q (By Mr. Sickles) What is the purpose, as far as Local 22 is concerned, for decals to be affixed to mitered fittings? A For identification purposes.

Q Identification of what?

[188] A Of whoever made it, whether it's fittings or accessories or whatever it might be.



Q By whom? You said whoever made it. A By the contractor that we are in agreement with that is applying the material.

Q All right. Let me ask you this question —

**TRIAL EXAMINER:**

You want the company that has made those fittings identified?

**THE WITNESS:**

Right.

Q (By Mr. Sickles) You have a number of contractors in the city of Houston, do you not? A Right.

Q Roughly how many? A Fourteen, fifteen, something like that.

Q All right.

**TRIAL EXAMINER:**

Under contract with you?

**THE WITNESS:**

Under contract.

Q (By Mr. Sickles) All right. Do they all have an identical contract? A Identical contract.

Q Is one of them B&B? Did I hear that name earlier? A One of them is B&B.

Q Is one of them the Hebert Company? A One of them is the Hebert Company.

Q If B&B has a job and they are employing your workmen

**[189]** and onto the job are brought mitered fittings which have been mitered by employees of Hebert, who are also members of your union, will the employees of B&B put them on? A They would be instructed not to.

Q Why? A It would be a violation of the agreement.

Q Now, during this year have there been such instances of that in this area? A Yes.

Q Would you specify the instances, the instance or instances? A I can think of one offhand, at the moment, of a contractor in agreement with us, Industrial Insulators, who has a job on which prefabricated fittings, et cetera, were brought to the job, bearing the decal of another contractor, which we were instructed not to apply and they haven't been applied.

Q All right.

And this other contractor, what was his name? A The one on this particular job, I believe, was Premetco from Shreveport.

Q And they, does Premetco employ union members? A For the labels.

Q For the labels? A Employ —

[190] TRIAL EXAMINER:

But you wouldn't let them put them on?

MR. SICKLES:

That's correct.

Q (By Mr. Sickles) And would you — A Violation of the agreement. No sublet contract.

Q And would you explain to the Examiner why you would not? A It's a violation of Article VI, no sublet.

TRIAL EXAMINER:

Well, I don't — maybe I don't understand it. The general contractor did have an agreement with the local, and then the supplier of these materials also had an agreement with the local.

**MR. SICKLES:**

No, two separate — well, I will ask Mr. Baker again.

**Q** (By Mr. Sickles) Who was the contractor that the material was delivered to? **A** Delivered to the applicant, or on the job is Industrial Insulators.

**Q** And —

**TRIAL EXAMINER:**

And you had a contract with them?

**THE WITNESS:**

Had an agreement with Local 22.

**TRIAL EXAMINER:**

Now, who was the supplier that sent them down?

**THE WITNESS:**

The supplier was an insulation contractor in agreement with another local union of the Asbestos Workers,

**[191]** of Local 21, Premetco in Shreveport, Louisiana. With the labels affixed, we did not apply.

**Q** (By Mr. Sickles) All right. Suppose that they had been supplied by another Houston contractor and the mitering had been done by members of Local 22, what would your instructions have been? **A** Instructed not to apply.

**Q** Not to apply? **A** It would have been a violation of the agreement.

**Q** All right.

To your knowledge are Techalloy stainless steel bands union made? **A** To my knowledge, no.

**Q** To your knowledge? **A** No.

**TRIAL EXAMINER:**

No.

Q (By Mr. Sickles) And have you ever instructed or had your local instruct the members not to handle Techalloy bands? A Only in this one instance where they were pre-cut.

Q Since this case has come about, but prior to September 13, the date of the injunction, have Techalloy bands been used by members of your union? A Yes.

**TRIAL EXAMINER:**

The ones that were not prefabricated?

**[192] THE WITNESS:**

The ones that were not prefabricated.

**TRIAL EXAMINER:**

We had that pretty clear, I guess, before.

Q (By Mr. Sickles) I show you, Mr. Baker, that which has previously been referred to as a pre-molded fitting. A Right.

Q To your knowledge do any members of Local 22 work on the pre-molding of fittings? A Work on the —

Q On the manufacturing of these fittings. A No, no.

Q Does your local have any instructions to its membership not to handle, apply or use pre-molded fittings? A No, they have no instructions.

**TRIAL EXAMINER:**

You take those from anyone?

**THE WITNESS:**

Wherever they come from.

Q (By Mr. Sickles) There was testimony earlier to a fitting called Pam-Rod. Is that the same type of fitting that I have just showed you? A Well, I don't know what kind, all the types that they make. I have seen some, but I don't think that they mold a fitting in that shape. I think theirs is a cut fitting into a one-piece half.

Q All right. A I don't know, that might even be made by them, I don't

**[193]** know.

Q Well, when your — when pipe covering is manufactured in one half piece, does your union claim any jurisdiction to that, to the employees who work in the manufacturing? A No.

\* \* \* \*

Q (By Mr. Sickles) Mr. Baker, would you describe what we have been talking about today, this so-called decal? A Well, it's a gummed label, not as large as the back of these matches here (indicating).

**TRIAL EXAMINER:**

It's a gummed label?

**THE WITNESS:**

It's a gummed label and it's not quite that large, about half that size. (Indicating.)

**TRIAL EXAMINER:**

And it has a number on it?



**THE WITNESS:**

And it has a serial number on it.

**TRIAL EXAMINER:**

Yes.

**MR. SICKLES:**

Right.

**THE WITNESS:**

And it comes to us, we have them made up in rolls just like a roll of stamps, and it's already gummed, and it's onto a waxed paper, that you just peel it off of there, and it's the type of gum on there that you

**[194]** just press it in and it automatically sticks itself.

**TRIAL EXAMINER:**

Who puts this on, the union or the union member or the company that manufactures it?

**THE WITNESS:**

The men who has charge of the shop.

**TRIAL EXAMINER:**

He puts it on?

**THE WITNESS:**

Making up the fabricated items, he either affixes it to the fitting, itself, or to a box.

**TRIAL EXAMINER:**

Well, is this at your request or does the company want them to do it?

**THE WITNESS:**

It's our request, to identify it.

**TRIAL EXAMINER:**

Because you want the contractor identified when the material is received?

**THE WITNESS:**

Right.

**TRIAL EXAMINER:**

All right.

Q (By Mr. Sickles) All right.

Now, did you indicate there were numbers on it?

A There are serial numbers.

**TRIAL EXAMINER:**

You have a record of those numbers so you can identify the contractor by the serial number?

**THE WITNESS:**

That's correct.

Q (By Mr. Sickles) And who keeps those records?

A They are kept in the business agent's office. He has a record book with the serial numbers, and they are issued to whatever contractor that is prefabbing materials, and the number of decals required are sent over to that shop

[195] and the number, each serial number is recorded in this book, in his permanent records in this book that we have in evidence.

**TRIAL EXAMINER:**

When a supply comes to a contractor, a general contractor, at the building site or the construction

site, where you have a contract, one of your men will then call you when this comes in to tell you either it has a decal or does not, if it does not?

THE WITNESS:

That's right.

TRIAL EXAMINER:

If it has a decal he will tell you what the number is?

THE WITNESS:

Right. If it has a number we verify the number.

\* \* \* \*

Q There has been testimony regarding a meeting at the Engineers Club, two meetings at the Engineers Club, with various members of the Houston Insulation contractors. Would you advise us as to the discussions of that meeting?

\* \* \* \*

[196] A I was invited to the meeting by the Contractors Association to discuss —

TRIAL EXAMINER:

This is the first meeting, stick to the first meeting, and then take the second one second.

THE WITNESS:

Actually, I can't remember the different discussions between one and the other, really.

TRIAL EXAMINER:

Yeah. Well, all right.

**THE WITNESS:**

But, primarily, I mean, we were discussing the usage of the identification of the decals to fabricated materials that were fabricated off of the job site and sent to a job site.

**TRIAL EXAMINER:**

Right.

**THE WITNESS:**

And in our discussion of these decals and the use of them, I pointed out to them that we were not married to the decal, that that was our best means of identification, and that if they had a better way of identifying the materials, so that we would get the stuff applied once it got onto the job, we know that everything

[197] is all in order, come up with some recommended means of identifying. The only thing that was suggested was a tape with some kind of an imprint similar to what we have on a stamp.

**TRIAL EXAMINER:**

What was wrong with the decal you were using?

**THE WITNESS:**

I find no reason from my point of view. I see nothing wrong with it. But they were objecting to it. So I told them if they had a better means of identifying, tell me. We hadn't used this system all of our life. We could change. We had previously used a shipping ticket system. When a bill of materials was made up and shipped out, well, the man in charge would list all of the materials, where it was going to, and sign the ticket showing that it was made up according to

all rules of the agreement, and then we later developed this decal system,

The only suggested means of changing was the tape, and no one had any idea as to the cost or the amount that it would —

**TRIAL EXAMINER:**

There was no agreement reached that you could change from the decal to any other form of identification?

**THE WITNESS:**

No, that was the only suggested change was to the use of a tape, and there was no facts or figures available as to what it would cost or anything.

**[198] TRIAL EXAMINER:**

Did any representatives of these employers suggest no identification?

**THE WITNESS:**

Well, that could have been in the discussion, but to our mutual interest, well, we —

**TRIAL EXAMINER:**

You certainly weren't going to agree to that?

**THE WITNESS:**

No. We need some means of identifying.

**TRIAL EXAMINER:**

To police your contract?

**THE WITNESS:**

That's right.



Q (By Mr. Sickles) Now, you said identification a number of times, Mr. Baker. Identification of what?

A Of the contractor making the materials.

Q You had a telephone discussion with Mr. Foster, did you not? A I have had quite a few.

Q That Mr. Foster testified to today? A Yes.

Q Regarding the problem of identification? A Right.

Q Did you make any statements to him regarding use of material, as to whether or not union men had been involved in the mitering? A No, no discussion on that.

Q There has been testimony that certain bands have been used in the Local 22 area, which are similar to the Techalloy

[199] bands, and they have been pre-cut, and that they have been used by your workmen.

Do you have any knowledge of this? A I have no knowledge of that, no.

Q If you had had knowledge would you have issued any instructions? A If we had knowledge that they were not made by the contractor —

Q No, that they were not pre-cut. A That they were pre-cut by someone other than the contractor applying them, then they would have been instructed not to use them.

CROSS EXAMINATION

**[205]** Q (By Mr. Safos) I show you, Mr. Baker, a document, a photocopy of a document, dated May 27, purportedly carrying your signature. The subject is "Decal Labels, General Information."

Do you recognize this — A Yes, sir.

Q — as a document issued by you? A Yes, sir.

Q I direct your attention to the second sentence of the first paragraph. Would you read that, please, sir?

\* \* \* \*

**[206] MR. SAFOS:**

We mark it for identification as General Counsel's Exhibit 2.

(The document above-referred to was marked General Counsel's Exhibit No. 2 for identification.)

Q (By Mr. Safos) Would you read that, please, sir? A "The purpose of this gummed label is to properly identify the Asbestos Worker who performed the work and to insure quality workmanship both on and off the construction-job site."

Q Now, with reference to the words "Asbestos Worker," which are capitalized, to whom does that refer? A It means to me it refers to an asbestos worker working under the agreement that we operate under.

Q It refers to an individual employee? A If he is an employee of some contractor.

**TRIAL EXAMINER:**

With whom you have a contract?

**THE WITNESS:**

Right.

**Q** (By Mr. Safos) Does it relate also to a member of the labor organization? **A** Not necessarily.

**TRIAL EXAMINER:**

Well, they would be included if they worked under the contract.

**[207] MR. SAFOS:**

They would be in the bargaining unit.

**THE WITNESS:**

We have people working at our trade that are not members of our labor organization.

\* \* \* \*

**Q** (By Mr. Safos) . . .

In the third paragraph, the final sentence, would you read that, please, sir? **A** Is this the one, now, "The member who fabricates material and fails to affix the decal, signifying union made, is equally responsible as the member who applies the fabricated materials without decals"?

**Q** This does say "member," does it not? **A** It says "member," in this instance.

\* \* \* \*

**[208]**

(The document above-referred to heretofore marked General Counsel's Exhibit No. 2 for identification, was received in evidence.)

Q (By Mr. Safos) Mr. Baker, let me ask you this, are these documents, these decals, you refer to them as — I like your term better — A It's a gummed label.

Q A gummed label, I like that because it's more appropriate.

TRIAL EXAMINER:

With a serial number on it.

Q (By Mr. Safos) Yes. Are these gummed labels issued to any employer who is not in contractual relationship in this jurisdiction with Local 22? A No.

TRIAL EXAMINER:

No.

Q (By Mr. Safos) He could not get them, could he? A No, we have no reason to give them to him.

Q Well, then, if a witness testifies that he calls you

[209] when he sees a decal, what would that indicate, or calls Mr. Schrode at Local 22 to report that a commodity or item has come on the project that contains a decal?

TRIAL EXAMINER:

He also gives you the number.

A Sir, it would indicate that material is made under the contract.

\* \* \* \*

Q (By Mr. Safos) Well, it couldn't be any other interpretation, if an employer is not in contractual

relationship, he cannot get them, is that it? A Well, we consider them union contractors, just like our union members.

\* \* \* \*

### CROSS EXAMINATION

Q (By Mr. Deakins) . . .

\* \* \* \*

Q And it was offered in evidence there as Exhibit 1, in

[210] case you don't remember. A Oh, yes.

\* \* \* \*

[211] Q (By Mr. Deakins) Now, Mr. Baker, you will recall that, the information that was shown on the pages of Charging Party's Exhibit 2, won't you, you remember that, don't you? A Basically, yes.

Q Yes.

Now, what do you sell those decals or those gummed labels for? What do you charge for them? A Not a thing.

Q Not a thing.

Now, you will recall when I questioned you with reference to that you examined that document and found that those decals had been issued only to members of the union, isn't that right? A That's right.

**TRIAL EXAMINER:**

(Contracting employers.



**THE WITNESS:**

Employers.

**[212]** Q (By Mr. Deakins) And they were named in there, weren't they, Mr. Baker?

A They were employees of a contractor who was also listed. Q Which employees you said were all members of your union, isn't that a fact? A Yes, sir.

Q All right.

Now, the contractor was shown by an initial over on the right-hand side of that page, wasn't he? A Well, most of them have long names and the names were shortened, some of them.

Q You had every other name of everybody to whom those gummed labels were issued written out in longhand, didn't you? A No.

**MR. SICKLES:**

I object. This is getting a little argumentative.

**TRIAL EXAMINER:**

It's repetitious. I understand this system completely. I sustain the objection.

**MR. DEAKINS:**

Well, Mr. Examiner, the point I am trying to make is we have kind of gilded this lily. Mr. Baker is up here to indicate these were issued to the contractors when in fact he testified previously they were issued to the men.

**TRIAL EXAMINER:**

I sustain the objection.

**[213] MR. SICKLES:**

Don't fight with him. He so testified.

**TRIAL EXAMINER:**

Yes, he has agreed with you.

Q (By Mr. Deakins) All right, now who has these gummed labels made up, the union? A Yes.

Q Who puts the numbers on them, the union? A Yes.

Q They have somebody put the numbers on them?

A Yes, they are made in there.

Q No contracting party has anything to do with them except —

**TRIAL EXAMINER:**

To receive them.

**MR. DEAKINS:**

— to receive them, if they receive them, or if their employee, who is a member of your union, receives them? A That's right.

Q Who are they delivered to? A Whoever comes over to pick them up from the company.

Q Well —

**TRIAL EXAMINER:**

I don't think this is material. I really don't. We are getting into an area —

A Sometimes it's a truck driver, sometimes.

Q Well —

**TRIAL EXAMINER:**

It should be the mechanics of it. What is important

ant is what was done and the purpose this was  
 [214] used for, and that we have established.

I don't care who picks them up or who makes them. It could be a truck driver.

Obviously, this is the union's gummed label. We know that.

MR. DEAKINS:

We are interested, Mr. Examiner, in —

TRIAL EXAMINER:

I am not, though.

MR. DEAKINS:

— who they were furnished to.

TRIAL EXAMINER:

We know that. To the contractors with whom they have contracts. This has been his testimony.

MR. DEAKINS:

Well, I disagree with the Examiner on that testimony.

Q (By Mr. Deakins) Now, when you talked about the man in charge, when you were talking about the shipping tickets, who did you mean to refer to then?

A The man in charge of the shop that is making up whatever stuff is being made up.

Q Well, now, was the man in charge always a member of your union, to the best of your recollection?

A I would hope so.

\* \* \* \* \*

**[216]** Q (By Mr. Deakins) But you never issued in your book a gummed label to anybody that wasn't a member of your union? And you so testified in District Court, didn't you? A Right.

\* \* \*

**[217] REDIRECT EXAMINATION**

Q (By Mr. Sickles) Mr. Baker, are you an official of Local 113? A No, sir.

Q Mr. Baker, if a gentleman who did not belong to, was not a member of your union, but who was employed by a union insulation contractor, came to you for gummed labels, would you give them to him? A If he was working for a contractor in agreement, and prefabbing the material, sure.

Q Have there been any instances, to your knowledge, in the jurisdiction of your local where there were not gummed labels applied to a fitting, yet the fittings were applied on the job site? A Yes.

\* \* \*

**[219] JOSEPH R. SHRODE**

was called as a witness by and on behalf of Respondent Local No. 22, ...

\* \* \*

**TRIAL EXAMINER:**

Give your name and address to the reporter.

**THE WITNESS:**

Joseph R. Shrode, S-h-r-o-d-e, 2220 Camille, Pasadena.

## DIRECT EXAMINATION

Q (By Mr. Mitchell) Are you the business agent for Local 22. A Yes, sir.

Q How long have you been so employed? A Four years.

Q Mr. Schrode, do you remember having your attention called to the fact that some pre-cut stainless steel bands were delivered to the Johns-Manville job in the Texas City area? A Yes, sir.

Q How and under what circumstances was that information brought to your attention? A I was told by one of my — one of the employees of Johns-Manville, that these bands had arrived at their shop pre-cut.

Q Pre-cut. And where at their shop?

[220] A At Houston, on Blodgett.

Q All right.

And upon receiving that information what action, if any, did you take? A Well, he had called me and asked me if he could — he was in the process of putting seals on these bands, and I instructed him that he should not do that, that he should not do that.

Q And why was that, Mr. Schrode? A Because these bands weren't cut by that particular shop that he was employed by.

Q That would have been the Johns-Manville shop? A Right.

Q All right.

Now, when next did you have anything to do with these pre-cut bands that were delivered to the Johns-Manville job at Texas City? A I had a conversation with the foreman of that job, Mr. David.

Q Is that Mr. David here?



**TRIAL EXAMINER:**

Who testified in this proceeding?

**THE WITNESS:**

Right.

Q (By Mr. Mitchell) All right. And what did you tell him? A I told him that if these pre-cut bands arrived on that

[221] job without decals specifying that they were cut by Johns-Manville, not to apply them,

Q All right.

Did you tell him or anybody else concerning these pre-cut steel bands that they were not to be applied because they were made by non-union labor?

\* \* \*  
A No, sir, I sure didn't.

\* \* \*  
Q . . . Now, Mr. Shrode, do you know whether or not Techalloy is in contract with Local 22 or any affiliate local of the International Union? A I know they are not in contract with Local 22.

Q All right.

Mr. Shrode, are you familiar with the fact that Techalloy products when delivered to the job sites in rolls of bands before they are cut have been worked on or applied by members of your local? A Yes, sir, on many occasions.

Q Well, then, can you explain for the record here the difference between working, your members work-

ing on Techalloy products before they are cut and refusing to work on

**[222]** Techalloy products when they are pre-cut or prefabricated? A Yes, sir, I will attempt to.

Q What is the explanation? A If they are delivered in the roll and cut to length on the job, that we claim is our jurisdiction of work, the cutting of these bands to length.

Q All right.

Now, are you familiar with this contract that has been introduced into evidence here as Charging Party's Exhibit No. 1? A Fairly.

Q Are you familiar with Article VI and Article XIII of this contract? A Yes, sir.

Q Do either of those articles form the basis of your position with regard to whether or not you will work on or with a product? A Yes, sir, very much so.

Q All right.

Now —

#### TRIAL EXAMINER:

In other words, if in your opinion either Article VI or Article XIII has been violated, you will take some action with respect to the product?

#### THE WITNESS:

Right.

#### TRIAL EXAMINER:

That action will consist in telling  
**[223]** your membership not to use them?

#### THE WITNESS:

That's right.

**Q** (By Mr. Mitchell) All right.

Now, you heard, I am sure, Mr. Roberts' testimony here earlier this afternoon in connection with some aluminum bands that were applied to some insulation down at the NASA base. A Yes, I heard that testimony.

**Q** Is there any distinction or explanation of why you would not instruct your members to work on that type of material and instruct your members not to work on the Techalloy pre-cut stainless steel bands? In other words, what is the difference, if there is any?

\* \* \* \*

**[224] TRIAL EXAMINER:**

Now, why was there no refusal to handle that when there was a refusal to handle the steel?

**THE WITNESS:**

Is that the question?

**TRIAL EXAMINER:**

Yes.

**MR. MITCHELL:**

Yes.

**THE WITNESS:**

It wasn't to my knowledge that there was such a thing being done. Had I known it, I would have objected and —

**TRIAL EXAMINER:**

There is no distinction between aluminum and steel as far as your policy is concerned?

\* \* \* \*

**CROSS EXAMINATION**

Q (By Mr. Safos) Just one or two brief questions. To your knowledge Techalloy is not a member of the Association and not subject to this contract; that's correct, is it?

[225] A To my knowledge, no, they are not.

**TRIAL EXAMINER:**

In fact, you know they are not, don't you?

**THE WITNESS:**

I know they are not.

Q (By Mr. Safos) Your instructions, then, to Mr. David were purely on the basis of the fact that this should not be installed, you had heard that these bands had been pre-cut, of course it's been established that they were pre-cut by Techalloy — A Right.

Q — who doesn't have a contract, and your instructions were to the effect that he and the employees, insulation employees on the job, the Johhs-Manville job, should not apply them because they had not been fabricated or pre-cut by, in this case, Johns-Manville, with whom you do have a contract? A Right.

\* \* \* \*

[226]

JAMES R. EATON

was called as a witness by and on behalf of  
Respondent Local No, 113 . . .

[227]

TRIAL EXAMINER:

Give your name and address to the re-  
porter.

THE WITNESS:

James R. Eaton, E-a-t-o-n, 4525 Garfield Drive,  
Corpus Christi, Texas.

## DIRECT EXAMINATION.

Q (By Mr. Mitchell) Would you give us your oc-  
cupation? A I am part-time business agent, Local  
113.

Q How long have you been occupying that posi-  
tion? A Two years.

Q Mr. Eaton, I want to direct your attention to  
this job of the Armstrong Company at Victoria, and  
ask you when it was that your attention was first di-  
rected to some mitered fittings that were delivered to  
that job. A Sometime in July. I don't remember the  
exact date.

Q All right.

And who was it that called these mitered fittings  
to your attention? A Well, in the course of routine  
checking of jobs, and it was — my attention was  
called to it by other members employed on that job.

Q All right.

And after your attention was called to it, what did  
you do? A Well, I contacted the foreman over



there and asked him  
[228] to make those fittings and he said no, that they were shipped in, and I asked who made them, and he said he did not know.

Q (By Mr. Mitchell) What was your purpose in making that inquiry? A I wanted to know who made the fittings, who they were made by.

Q All right.

And why did you want to know that? A For the preservation of our contract.

Q All right.

And then who did you attempt to talk to, if any one, to

[229] determine who made or fabricated these fittings? A They were not made on the job, so when —

Q No, I ask you now who did you talk to in connection with, say, Armstrong or anybody else to determine who made these fittings? A I talked to Mr. Williams and one time Mr. Foster and one time Mr. Lunda over the telephone.

Q All right.

Who is Mr. Williams? A Lynn Williams, he was the field superintendent for Armstrong.

Q All right.

And Mr. Foster? A He is his direct —

Q Is that the same Mr. Foster that testified here this morning? A Yes, sir, same one.

Q And then you mentioned Mr. Lunda. Who is he? A He is evidently over the Armstrong office here. I talked to him one time over the phone.

Q All right.

Now, what was your conversation with these men, Foster and Williams? A You just want to go through, all the way through from —

Q Well, I want you to give us, if you can tell us what

[230] the conversation was about, and what the sense of it was. A Well, Mr. Williams and I, he came down and I asked him who made the fittings, and he said, "We made them," and I said, "Well, can you furnish me proof?" of course, and he said, "Yes." So he went ahead and had a letter wrote to me.

Q All right.

Now, before we get to that, during any of this conversation that you had with either of these men, was any objection made by you or any inquiry made by you as to whether or not these fittings had been made by union or non-union people? A No.

Q Did you make any such inquiry at all? A No.

\* \* \* \*

Q (By Mr. Mitchell) All right. I think you said that as a result of that conference and as a result of talking to Mr. Lunda over the telephone you were sent a letter? A Yes.

Q I am going to hand you what has been marked as

[231] Respondent Local Exhibit No. 1 and ask you whether or not that is a copy of the letter that you received from Mr. Lunda. A It is.

(The document above-referred to was marked Respondent Local Exhibit No. 1 for identification.)

Q (By Mr. Mitchell) Was that letter written after you had had your conferences with Mr. Foster and Mr. Williams at the job site? A Well, I don't remember the exact date. But I had talked to Mr. Williams prior to this. I don't remember at the time whether Mr. Foster was down there before or after this letter.

Q All right.

Now, I want to ask you this, Mr. Eaton.

Had you received any information at all or did you have any information at all that Armstrong had made these fittings several years ago on another job? Had that representation ever been made to you? A I could explain that this way. We were discussing, I believe, Mr. Williams and I, the local cost that they had, that they took this job. He made the remark at that time that they had a lot of this stuff on hand left over from other jobs. That was just a casual remark on his part.

\* \* \*

[232] MR. MITCHELL:

Mr. Hearing Officer, I am going to offer Respondent Local Exhibit No. 1 into evidence at this time, it being material in showing the substance of the conversations that took place between this witness and Armstrong's managers and executives.

TRIAL EXAMINER:

Any objection?

MR. DEAKINS:

Mr. Examiner, I object to this letter as there has been no showing that the Corpus Christi contract had an Article VI or XIII in it.

**TRIAL EXAMINER:**

That what?

**MR. DEAKINS:**

It doesn't prove anything, that is, assuming the union's contention is correct.

**TRIAL EXAMINER:**

Well, it refers certainly to the prefabricating of fittings on the Victoria job. It's a statement they were all made in the Houston shop by Carmichael, a member of the local. It would appear to be, in

view of

**[233]** what actually transpired here, but I am going to accept it. It's a statement by Armstrong, itself.

**MR. DEAKINS:**

All right.

**TRIAL EXAMINER:**

Which, if my recollection is correct, the statement is incorrect.

**MR. SAFOS:**

I think his statement is correct.

(The document above-referred to, heretofore marked Respondent Local Exhibit No. 1, was received in evidence.)

**THE WITNESS:**

I don't have it with me. I have it in my room.



**MR. MITCHELL:**

Your contract?

**THE WITNESS:**

Yes. Ours is VI and XI. Yours is VI and XIII.

**MR. SICKLES:**

May I direct your attention to Article I of the collective bargaining agreement, Mr. Examiner, under which a Houston insulating contractor working in the 113 territory would abide by the working conditions down there. We have been talking about this contract, and this job actually took place in the Local 113 Territory.

**TRIAL EXAMINER:**

I assume that, yes. . . .

\* \* \* \*

**[237]**

### **CROSS EXAMINATION**

**Q** (By Mr. Safos) Mr. Eaton, who was the foreman on the Victoria job that you talked to? **A** Bob Graham.

**Q** Bob Graham.

Is he a member of Local 113? **A** He is.

\* \* \* \*

**[238]** **Q** (By Mr. Safos) I just wanted to know if he asked you whether he could install them without the decals. **A** I don't remember. I am sure he did. I probably told him "No."

**Q** Did you tell him what would happen if he did?



A Well, yes.

Q What was that? A That any member who — it's stated as part of our policy of our local that any member who installs a fitting without the decal or without us knowing where it's made will be brought before the Executive Board.

[239] TRIAL EXAMINER:

He is subject to disciplinary action?

THE WITNESS:

Right.

\* \* \*

## GENERAL COUNSEL'S EXHIBIT NO. 2

May 27, 1963

### GENERAL INFORMATION SUBJECT: DECAL LABELS

The General Executive Board in regular session in March 1961, approved the use of a gummed Decal Label to be affixed to insulating materials, such as fittings, packages of pre-cut lagging for specific items, bundles of accessories, etc., which have been pre-prepared, in any degree, off the actual job site where the materials are applied. The purpose of this gummed label is to properly identify the Asbestos Worker who performed the work and to insure quality workmanship both on and off the construction job site.

Numbered gummed Decal Labels are supplied by the General Office through the Business Agent to the

worker in charge of preparing the materials off job site, who shall then report the kind, quantity, and etc., to the Business Agent in order for proper assurances of application. This procedure of labeling was announced and explained in the Asbestos Workers Journal in May, 1961, and was announced and discussed at Local Union and Joint Trades Board Meetings on several occasions since March, 1961. Labels have been available in ample quantities since June, 1961.

The International usage of "Decals" affixed to fabricated fittings, items or boxes or bundles of miters or lagging or accessories made up by our membership to be used at a location other than the fabrication shop site is now in its second year and all members are expected to abide by this International practice established by the General Executive Board. The member who fabricates material and fails to affix the "decal", signifying union made, is equally responsible as the member who applies the fabricated materials without "decals."

Reports indicate that there may be some materials being received on some jobs today without proper identification being supplied. In event this should happen on your job, please contact the Business Agent - - so proper investigation can be made and appropriate action taken to insure proper credit for work performed.

Sincerely and  
fraternally yours,  
(Signed) BROOKS BAKER  
Brooks Baker

**RESPONDENT'S LOCAL EXHIBIT NO. 1****ARMSTRONG**

**Contracting And Supply  
Corporation**

**7310 Ardmore  
P. O. Box 14009**

**Telephone: Riverside 7-5530**

**Houston 21, Texas**

**July 17, 1963**

**International Association of Heat and  
Frost Insulators and Asbestos Workers  
Local No. 113  
P. O. Box 1112  
Corpus Christi, Texas**

**Attention: Mr. J. R. Eaton, Business  
Agent**

**Gentlemen:**

**Subject: Prefabricated fittings**

**E. I. du Pont de Nemours Job  
Victoria, Texas**

**This is to advise that it is the practice of Armstrong Contracting and Supply Corporation of Houston, Texas to fabricate all mitered fitting covers utilizing Asbestos Workers at all times. All fittings which have been fabricated and shipped to the above subject job were made in our Houston shop by Mr. B. D. Carmichael, a member of Local 22.**

**With the above facts in hand we request that you instruct your membership to proceed immediately with**

the application of these fittings. Your prompt attention to this matter will be sincerely appreciated.

Very truly yours,

**ARMSTRONG  
CONTRACTING AND  
SUPPLY CORPORATION**

(Signed) **N. W. LUNDA**

**N. W. Lunda**

**District Manager**

**KC**

**R. D. Graham**

**L. J. Williams**



**RESPONDENT'S LOCAL EXHIBIT NO. 2****AGREEMENT****July 10, 1961****thru****June 30, 1964****Individual Employer  
with****Insulating Contractors  
ASBESTOS WORKERS****LOCAL NO. 113****Corpus Christi, Laredo and  
Harlingen, Texas****AGREEMENT**

**THIS AGREEMENT, made and entered into this 10th day of July, 1961, by and between MASTER INSULATION ASSOCIATION (hereinafter called the "Employer") and International Association of Heat and Frost and Asbestos Workers, Local No. 113 of Corpus Christi, Laredo, and Harlingen, Texas (hereinafter called the "Union").**

**ARTICLE I**

**It is hereby agreed that the provisions of this Agreement shall be binding upon the Employer and upon the Union, within a radius of Thirty (30) miles from City Hall—outside territory situated half way to any other affiliated Local Union, Rand & McNally's map shall be considered the Official Map of the Trade. All places on said map touched or intersected by radius circle shall be considered within the territory, and in**



such cases the entire town or city limits of such places shall be considered within the territory.

The Employer further agrees that on all operations outside the chartered territory of the Union, he will abide by the rates of pay, rules and working conditions established by collective bargaining agreement between the local insulation contractors and the local union in that jurisdiction.

## ARTICLE II

The "Regular" work day shall be Monday thru Friday, eight (8) hours between 8 a. m. and 4:30 p. m.

## ARTICLE III

The ratio of Improvers may equal but not exceed a ratio of one (1) Improver to four (4) Mechanics employed in a shop. No Improver shall execute work unless in company with a mechanic.

## ARTICLE IV

All labor in excess of the "regular" work day, on Saturday, Sunday and observed holidays, shall be known as overtime and shall be paid for at a double time (2) rate of wages if ordered by the Employer. The observed holidays are: New Year's Day, Decoration Day, Independence Day, Thanksgiving Day, and Christmas Day. No work shall be performed on Labor Day except in special cases of emergency and then only when triple (3) time is paid.

When a holiday falls on Sunday the following Monday shall be observed as the holiday.

## ARTICLE V

There shall be a Trade Board consisting of three (3) members of the Corpus Christi, Harlingen, and Laredo, Texas, insulation contractors, and three (3) members of Local No. 113, and said Trade Board shall have the right to investigate all labor operations of the parties to this Agreement within its prescribed limits so far as any of the provisions of this Agreement are involved, in connection with which any question may arise, and for this purpose shall have the right to summon, question, and examine any party to this Agreement, or their representative or Agents.

There shall be no lockouts except when of a general nature and ordered by a Building Trades Employers Association, and approved by the Corpus Christi, Harlingen, and Laredo, Texas contractors, or strikes except when of a general nature and ordered by a Building and Construction Trades Council with the approval of the International Association of Heat and Frost Insulators and Asbestos Workers. Trade disputes and grievances shall be settled without cessation of work, and in cases where the parties to this agreement fail to agree the matter in dispute shall be referred to the Joint Trade Board.

In case any disputes arise, notice must be given in writing to the Secretary of the Trade Board by aggrieved party within 30 days. The Trade Board shall be governed by the following By-Laws:

- A. Regular meetings shall be held quarterly.
- B. Special meetings shall be called by the Chairman of the Trade Board on written request of either side, stating object for which meeting is to be called, but no matters shall be discussed at special meetings except those designated in said written request.
- C. Four (4) shall constitute a quorum, two (2) from each side, neither shall cast more ballots than the other.
- D. The vote on all questions of violations of this Agreement shall be by secret ballot.
- E. It shall require a majority vote to carry any question.

#### ARTICLE VI

The Employer agrees that he will not sublet or contract out any work described in Article XI. It is also agreed that no member of a firm or officer of a corporation or their representative or agents shall execute any part of the work of application of materials.

#### ARTICLE VII

The Employer hereby recognizes the Union as the exclusive collective bargaining agent for employees classified as Mechanics and Improvers who perform any of the duties as described in Article XI hereof.

## ARTICLE VIII

The following wage rate shall apply:

July 10, 1961 to June 30, 1962 —

Mechanics \$3.90 per hour

1st Yr. Improver—50% of Mechanic rate

2nd Yr. Improver—60% of Mechanic rate

3rd Yr. Improver—70% of Mechanic rate

4th Yr. Improver—80% of Mechanic rate

\$0.10 Welfare

\$0.10 Pension

July 1, 1962 to June 30, 1963 —

Mechanics \$4.05 per hour

1st Yr. Improver—50% of Mechanic rate

2nd Yr. Improver—60% of Mechanic rate

3rd Yr. Improver—70% of Mechanic rate

4th Yr. Improver—80% of Mechanic rate

\$0.10 Welfare

\$0.10 Pension

July 1, 1963 to June 30, 1964 inclusive—

Mechanics \$4.15 per hour

1st Yr. Improver—50% of Mechanic rate

2nd Yr. Improver—60% of Mechanic rate

3rd Yr. Improver—70% of Mechanic rate

4th Yr. Improver—80% of Mechanic rate

\$0.10 Welfare

\$0.10 Pension

It is not intended that Improvers, now members, will receive a cut in pay rates.

**ARTICLE IX**

Employees shall receive board when on jobs requiring same in the amount of \$6.00 per day worked and shall receive railroad transportation and local car or bus fares in excess of two city fares daily figured from Corpus Christi, Laredo, and Harlingen, Texas, City Hall to job and return to City Hall. Night traveling shall be paid for at single time, except in cases where berth is provided, when no traveling time shall be paid. When boarding on out-of-town jobs they shall receive all transportation expenses expended.

**ARTICLE X**

Employees shall be at a point \_\_\_\_\_  
\_\_\_\_\_ ( ) minutes' travel time from Shop employing them at 8 a. m. and 5 p. m. Day travel beyond said point shall be paid for during "regular" working hours.

**ARTICLE XI**

This agreement covers the rates of pay, rules and working conditions of all employees classified as Mechanics and Improvers engaged in the preparation, distribution and application of pipe and boiler coverings, insulation of hot surfaces, ducts, flues, etc., also the covering of cold piping and circular tanks connected with the same and all other work included in the trade jurisdictional claims of the Union.



This to include alterations and repairing of work similar to the above and the use of all materials for the purpose mentioned.

## ARTICLE XII

Employees shall be considered "at work" for a Shop from time they accept employment and that they shall proceed to and execute said work in a faithful workmanlike manner and not quit same until after reasonable notice has been given Employer. Mechanic in charge of out-of-town operations where board is paid shall complete the same before leaving Shop of Employer. Complaints arising from inferior workmanship shall be given consideration by both parties to this agreement and all found contributing to it, penalized.

## ARTICLE XIII

The Union shall have a permanent office address with telephone service, where their Business Agent or authorized officer can be communicated with between Monday thru Friday between 8:00 a. m. and 5.00 p. m. each working day for the purpose of answering inquiries and providing necessary service to the trade.

## ARTICLE XIV

The Union agrees there shall be no limitations or restrictions placed upon the individual working efforts of employees.

**ARTICLE XV**

Either party to this Agreement desiring to renew it in present form or with change or amendment shall make known such intention in writing ninety (90) days prior to the expiration of this Agreement.

**ARTICLE XVI**

This Joint Trade Agreement shall become effective July 10, 1961 and shall be rigidly observed until its expiration June 30, 1964, during which time neither party to it shall continue in force or create any rule or By-Laws conflicting with its provisions.

**ARTICLE XVII**

Any portion of this Agreement found to be in violation of existing federal or state laws shall become in-operative and the balance of the Agreement as such, continue in full force and effect until date of expiration.

**ARTICLE XVIII****Welfare Plan:**

The terms and conditions of the Welfare plan, including the method of administration, which was developed and put into effect in October, 1953, shall continue for the duration of this Agreement, with the exception of the increases as set forth in Article VIII of the Agreement, all monies to be used for the purpose of said fund as set out in the Trust Agreement,

which is attached to this agreement and is incorporated herein by reference.

Payment of all Welfare Fund monies is due weekly as set forth in the Trust Agreement. One copy of the Welfare payments shall go to the Administrator, as designated by the Welfare Trustees, and one copy shall be sent to the Local Business Agent, No. 113.

## ARTICLE XIX

### Pension Plan:

A Pension plan together with the method of administration shall be developed and put into effect as soon as is reasonably possible. In the meantime, the employers contribution to such plan shall be placed in escrow with some Bank or Trust Co., of Corpus Christi, Texas, acceptable to both parties. The present Welfare trustees shall be the Trustees for the pension plan and shall be known as the Welfare and Pension Trustees. The employers contribution to the pension and welfare fund shall be in excess of wages, overtime, withholding tax, social security tax, and others. (Payment of all monies to be weekly as wages).

## ARTICLE XX

### Transportation:

Transportation on jobs beyond the twenty (20) air mile radius shall be figured from the nearest city where living accommodations are available. The mileage shall be figured from the city hall of the nearest city where living accommodations are available to and from the job site daily at the rate of \$0.08 per

mile. All employees, when traveling between chartered cities (at shops request) shall be paid travel time plus \$0.08 per mile to and from the job.

When an employee receives expense allowance provided in the above paragraph, he shall be reimbursed for his expenses in traveling to the job one time at the commencement of his employment and one time upon his return from the job when his employment is terminated by the employer. The rate of expenses for traveling in this instance shall be \$0.13 per road mile, figured from the city hall of Corpus Christi, Harlingen and Laredo, Texas to the job site. When transportation is furnished by the contractor and traveling is done on the contractors time, no transportation or travel time will be due employees. Night traveling shall be paid for at single time, except in cases where berth is provided, when no traveling time shall be paid.

**Zone Rates:** Rates to be figured from City Hall of Chartered cities, Corpus Christi, Harlingen and Laredo, Texas.

0 miles to 5 miles — \$0.00 per day—Zone 1  
 5 miles to 10 miles — 0.50 per day—Zone 2  
 10 miles to 15 miles — 1.30 per day—Zone 3  
 15 miles to 20 miles — 2.50 per day—Zone 4  
**Padre and Mustang Island Zone:**

Employees will travel to the end of Zone 1 free, then he will be paid \$0.08 per road mile to the job and return to Zone 1 daily. Employers will pay the daily toll charge to all island jobs. *Travel Expense*

to Reynolds Metal Co. will be \$1.50 per day per Employee.

When board is paid at Port Aransas daily travel will not be paid.

## ARTICLE XXI

### **Subsistence:**

All employees applying, mixing or distributing materials shall receive subsistence when on jobs twenty (20) air miles from the city hall of chartered cities of Corpus Christi, Laredo and Harlingen, Texas, in the amount of \$6.00 per day worked, including rainy days and holidays. When an employee does not report for work except on holidays, he will forfeit his subsistence. An Employee will not forfeit his subsistence when excuses are made by shop foreman such as material shortages, etc. In no instances shall these daily expenses be prorated.

## ARTICLE XXII

### **Wages and Expenses:**

Payment of all wages and expenses shall be weekly on the job. Unless mutually agreed otherwise, the regular work week shall end Sunday midnight. Pay day shall be the following Wednesday on the job by the regular quitting time, except may be delayed twenty-four (24) hours provided the envelope containing the checks is postmarked not later than 6:00 p.m. of the preceding Tuesday. Any violation of the rules concerning delivery of pay checks shall be dealt with by the Joint Trades Board. When an employee is terminated by his employer, he shall be paid in full.



**ARTICLE XXIII****Smoking:**

Employees working on jobs where no smoking is permitted, the contractor shall exhaust every effort to create a safe designated area where the employee may smoke at least once in the morning and once in the afternoon. This is a privilege and only a reasonable amount of time is used for this purpose.

**ARTICLE XXIV****The Record and Change Area:**

At no time shall an employee be required to punch a time clock, or keep any other method of time. This shall be the duties of the foremen in charge. At no time shall employees working on any job be required to pick up brass, chits or any form of identification, such as numbers, cards, etc., either going on or off the job.

Employees will report to a designated area chosen by the superintendent or foreman in charge of the job. Employer shall provide change shacks or rooms suitable for changing clothes and storing of tools.

**ARTICLE XXV****Scaffolding:**

Safe adequate scaffold shall be provided on all jobs. On operations above twenty (20) feet, scaffolding shall consist of not less than two (2) 2x10 walk boards tied together, side by side. Guard rails must be provided on each landing. Under no circumstances will wire, cable, or rope be accepted as a guard rail. Any

dispute arising about the above mentioned scaffolding shall be settled jointly by the job steward, the Business Agent, and the contractor.

Employer shall furnish leather gloves on Foamglas jobs and on jobs where metal lath backed insulation is used, saws on Foamglas jobs, and fans or blowers for ventilation in attics or skirts of towers or other locations when needed. Maximum size of buckets on all jobs shall be fourteen (14) quarts. Employers shall furnish ice water on all jobs.

#### ARTICLE XXVI

##### Uniforms:

Each employee shall, at his own expense, furnish his own work uniform. Such uniform to be approved by the Local Union.

#### ARTICLE XXVII

##### Show-Up Time:

An employee must be notified the day before by the Employer if he is not to report for work. When an Employer fails to comply with the above working rule, each Employee that reports for work, shall receive pay for two (2) hours. The Employee shall remain on the job for two (2) hours if requested to do so by the Employer.

#### ARTICLE XXVIII

When an employee is requested by the employer or job foreman to work out in the rain, the employer must furnish all necessary equipment, such as rain-

coats, hats, boots, etc. Safety equipment will be furnished by the employer.

### ARTICLE XXIX

The term of this Agreement shall commence on July 10, 1961, and shall continue in effect until midnight on the 30th day of June, 1964, and shall renew itself for terms of one year, from year to year thereafter, unless either the Employer or the Union shall give notice in writing to the other as stated in Article XV.

### ARTICLE XXX

This Agreement shall be signed by each individual Employer and the International Association of Heat and Frost Insulators, and Asbestos Workers Local Union No. 113.

### ARTICLE XXXI

In event International should cancel Board on a nation-wide basis, this agreement will conform.

#### SIGNED:

INTERNATIONAL ASSOCIATION OF HEAT  
AND FROST INSULATORS AND ASBESTOS  
WORKERS

LOCAL NO. 113

Per JACK M. HOOVER

President

Per JACK K. OUALLINE

Secretary

**MASTER INSULATION  
ASSOCIATION**

Per JOHN FOSTER, President  
Per CY LOPP, Secretary

**EMPLOYERS:**

Per C. J. LOPP,  
The Gilmin Co., Inc.  
Per JOHN FOSTER,  
Precision Insul. Co., Inc.  
Per A. W. MORGAN,  
Morgan Co.  
Per W. D. LEONARD,  
Thompe Products Co.

---

**CHARGING PARTY'S EXHIBIT NO. 1**

**MEMORANDUM OF AGREEMENT**

THIS AGREEMENT, made and entered into this 1st day of July, 1962, by and between Houston Insulation & Contractors Association (hereinafter called the "Employer") and International Association of Heat and Frost Insulators' and Asbestos Workers' Local No. 22 of Houston, Galveston, Beaumont, and Port Arthur, Texas, (hereinafter called the "Union").

**ARTICLE I**

It is hereby agreed that the provisions of this Agreement shall be binding upon the Employer and upon the membership of the Union individually and as members of the Union within a radius of thirty (30)

miles from City Hall — outside territory situated half way to any other affiliated Local Union. Rand & McNally's map shall be considered the Official map of the Trade. All places on said map touched or intersected by radius circle shall be considered within the territory, and in such cases the entire town or city limits of such places shall be considered within the territory.

The Employer further agrees that on all operations outside the chartered territory of the Union he will abide by the rates of pay, rules and working conditions established by collective bargaining agreement between the Local insulation contractors and the local union in that jurisdiction. The Employer may send a Mechanic, and in the event of insufficient supply of local labor in that territory, such additional employees as may be necessary and such employees shall receive in addition to transportation costs the highest wage rate, board allowance, fringe benefits and other conditions of employment of either that jurisdiction or established in this agreement.

The purpose of this Agreement is to fix the wages, hours and conditions of employment between the Employer and Employees represented by the Union who may from time to time be employed by the Employer; and to prevent work stoppages, strikes, lockouts, slow downs, sit downs and any other incidents which tend to disrupt the normal and proper Employer and Employee relationship.

## ARTICLE II

The regular work day shall be eight (8) hours be-



tween the hours of 8:00 A. M., and 4:30 P. M., or such regular work day as may be established as practice on any particular job by the Building Trades Council.

### ARTICLE III

The ratio of Improvers may equal but not exceed a ratio of one (1) Improver to four (4) Mechanics employed in a shop. No Improvers shall execute work unless in company with a Mechanic.

### ARTICLE IV

All labor in excess of the "regular" work day, on Saturday, Sunday and observed holidays, shall be known as overtime and shall be paid for at a Double (2) rate of wages if ordered by the Employer. The observed holidays are: New Year's, Decoration Day, Independence Day, Thanksgiving Day, and Christmas Day. No work shall be performed on Labor Day except in special cases of emergency and then only when triple (3) time is paid.

When a holiday falls on Sunday the following Monday shall be observed as the holiday.

### ARTICLE V

There shall be a Trade Board consisting of four (4) members appointed by the Houston Insulation Contractors Association and four (4) members appointed by Local No. 22, and said Trade Board shall have the right to investigate all labor operations of the parties to this Agreement within its prescribed

limits so far as any of the provisions of this Agreement are involved, in connection with which any question may arise, and for this purpose shall have the right to summon, question, and examine any party to this Agreement, or their representative or agents.

There shall be no lockouts except when of a general nature and ordered by a Building Trades Employers Association, and approved by the Houston Insulation Contractors Association; or strikes except when of a general nature and ordered by a Building and Construction Trades Council with the approval of the International Association of Heat and Frost Insulators and Asbestos Workers. Trade disputes or grievances shall be settled without cessation of work, and in cases where the parties to this agreement fail to agree the matter in dispute shall be referred to the Joint Trade Board.

In case any disputes arise, notice must be given in writing to the Secretary of the Trade Board by a grieved party within fourteen (14) days.

The Trade Board shall be governed by the following By-Laws:

- (a) Regular meetings shall be held monthly.
- (b) Special meetings shall be called by the Chairman of the Trade Board on written request of either side, stating object for which meeting is to be called; but no matters shall be discussed at special meeting except those designated in said written request.

- (c) Six (6) shall constitute a quorum, three (3) from each side; neither shall cast more ballots than the other.
- (d) The vote on all questions of violations of this Agreement shall be by secret ballot.

#### ARTICLE VI

The Employer agrees that he will not sublet or contract out any work described in Article XIII and the Union agrees not to contract, sub-contract or estimate on work nor allow its membership to do so nor to act in any trade capacity other than that of workman. It is also agreed that no member of a firm or officer of a corporation or their representative or agents shall execute any part of the work of application of materials and in no case shall any member of the Union estimate on or give any labor figures.

#### ARTICLE VII

The Employer hereby recognizes the Union as the exclusive collective bargaining agent for Mechanics and Improvers who perform any of the duties as described in Article XIII hereof.

## ARTICLE VIII

The following shall be the wage scale paid during the term of this Agreement:

- (a) The regular wage rates shall be as follows from July 1, 1962 to July 1, 1963.

|                         |         |
|-------------------------|---------|
| Journeyman .....        | \$4.175 |
| 4th Year Improver ..... | 3.35    |
| 3rd Year Improver ..... | 2.95    |
| 2nd Year Improver ..... | 2.55    |
| 1st Year Improver ..... | 2.25    |

- (b) The regular wage rates shall be as follows from July 1, 1963 to July 1, 1964.

|                         |         |
|-------------------------|---------|
| Journeyman .....        | \$4.325 |
| 4th Year Improver ..... | 3.50    |
| 3rd Year Improver ..... | 3.50    |
| 2nd Year Improver ..... | 2.65    |
| 1st Year Improver ..... | 2.35    |

- (c) The regular wage rates shall be as follows from July 1, 1964 to July 1, 1965.

|                         |         |
|-------------------------|---------|
| Journeyman .....        | \$4.475 |
| 4th Year Improver ..... | 3.60    |
| 3rd Year Improver ..... | 3.15    |
| 2nd Year Improver ..... | 2.75    |
| 1st Year Improver ..... | 2.45    |

All wages and expenses shall be paid weekly on the job by cash or company check and Employer shall make local arrangements for cashing checks drawn on banks located outside of Lu 22 Area. For the purpose of this provision, the regular work week shall end Sunday at midnight. Payday for each week shall

be at or before the end of the workday on the Wednesday following the end of the work week, except that if payment is made by check mailed in the United States mails, (prior notice that checks are mailed must be given to employee) and postmarked not later than 6:00 o'clock P.M., on the preceding Tuesday, payment may be delayed for twenty-four (24) hours without penalty. In the event a holiday is observed on Monday, the pay period limits shall be extended twenty-four (24) hours.

If any Employee shall be laid off, such Employee shall be paid all wages due at the time of such layoff.

The violation of any provision of this Agreement concerning the delivery of paychecks shall be handled by the Joint Trades Board.

#### ARTICLE IX

- (a) On all jobs located within a radius of 20 miles of the City Hall of Houston, Galveston, Beaumont or Port Arthur, Texas, each Employee who is regular assigned to work and reports to work during the regular work week but who is not permitted to work due to conditions beyond the control of such Employee, shall be paid two (2) hours straight time at the regular rate. Such Employees must remain on the job site for the entire time when they are paid for work which they do not perform unless released by the foreman in charge of the job.
- (b) Employees working on jobs within a radius of 20 miles of the City Hall of Beaumont or Port



Arthur, Texas, shall receive the following expense allowances:

|                            |                |
|----------------------------|----------------|
| 0 to 8 mile radius .....   | nothing        |
| 8 to 10 mile radius .....  | \$1.00 per day |
| 10 to 13 mile radius ..... | \$1.50 per day |
| 13 to 20 mile radius ..... | \$2.50 per day |

- (c) Employees working on jobs within a radius of 20 miles of the City Hall of Houston or Galveston, Texas, shall receive the following expense allowances:

|                            |                |
|----------------------------|----------------|
| 0 to 10 mile radius .....  | nothing        |
| 10 to 13 mile radius ..... | \$1.50 per day |
| 13 to 20 mile radius ..... | \$2.50 per day |

- (d) Employees engaged in preparing, applying, mixing or distributing materials for the Employer shall be reimbursed for living expenses when working on jobs out of Houston, Galveston, Beaumont or Port Arthur, Texas, if such jobs shall be 20 miles or more from the City Hall of the various named cities at the following rates:

Six Dollars (\$6.00) per day for each day worked up to a maximum of Forty-two (\$42.00) per week.

Such expenses shall be paid for rainy days and holidays provided the Employee reports to work at the job site on rainy days and remains at such place until excused by the Foreman or person in charge of the work.

In no instance shall daily living expenses be pro rated.

Airline miles shall be used in computing the distances set forth in paragraphs a, b, c, and d above.

- (e) An Employee who shall be entitled to receive expense allowance provided in paragraph d above, shall be reimbursed for his personal expenses in traveling to the job site one time at the time of the commencement of his employment and for the expenses upon his return when such job is ended or his employment is terminated Employer.

Employees entitled to the personal travel expenses provided in this paragraph, shall be reimbursed at the rate of thirteen and one-half cents ( $13\frac{1}{2}c$ ) per road mile from the nearest City Hall of either Houston, Galveston, Beaumont, or Port Arthur, Texas.

An Employee entitled to receive the living expense allowance provided in paragraph (d) above shall be reimbursed for daily travel to and from the job site at the rate of seven and one-half cents ( $7\frac{1}{2}c$ ) per road mile to within five (5) miles of the living accommodations nearest to the job site.

## ARTICLE X

It is understood and agreed that the Welfare Plan, together with the method of administration which was developed and put into effect on December 1, 1952,

shall be continued in effect during the term of this Agreement in accordance with its present terms and conditions as the same may be modified and improved until legal action has been approved to convert the plan to a program operated exclusively by the Union at which time the money provided shall be added to the Employees wages and deducted therefrom.

The sum of Ten cents (10c) per man hour worked shall be contributed to the Welfare Plan by the Employer.

All contributions to the Welfare Plan by the Employer shall be in excess of wages for the purpose of computing overtime, withholding tax, social security tax and otherwise.

## ARTICLE XI

A Pension Plan together with the method of administration as developed and put into effect, shall be continued in effect during the term of this Agreement, in accordance with its present terms and conditions, and as the same may be modified and improved until legal action has been approved to convert the plan to a program operated exclusively by the Union at which time the money provided shall be added to the Employees wages and deducted therefrom.

The Employer's contributions to the Pension Fund shall be Ten cents (10c) per hour worked until expiration of agreement.

The Employer's contributions to the Pension Fund

shall be in excess of wages, overtime, withholding tax, social security tax and others.

## ARTICLE XII

Employer agrees to deduct money for dues, etc., from the pay of all employees who are members of Local Union No. 22 and from such Travelers who are members of any other Local Union who are working for such Employer under the jurisdiction of this Agreement, provided such Employee authorizes the deduction of such moneys in writing in accordance with forms agreed upon. Such authorization may later be revoked in writing by the Employee. In no event shall Employer be liable or responsible to the Union for failure to collect such dues.

## ARTICLE XIII

The Agreement covers the rates of pay rules and working conditions of all Mechanics and Improvers engaged in the preparation, distribution and application of pipe and boiler coverings, insulation of hot surfaces, ducts, flues, etc., also the covering of cold piping and circular tanks connected with the same and all other work included in the trade jurisdictional claims of the Union.

This to include alterations and repairing of work similar to the above and the use of all materials for the purpose mentioned.

## ARTICLE XIV

A cash or surety performance bond shall be posted

by each Person, Firm or Company, who employs Asbestos Workers subject to this Agreement. Said bond shall be in an amount of not less than Five Thousand Dollars (\$5,000.00) guaranteeing the timely payment of wages, traveling and/or board expenses, fringe benefits, and/or other moneys withheld and due employees under the terms of the Agreement. Determination of whether the bond shall be cash or a surety bond shall be made by the officials of the Union.

## ARTICLE XV

Safety rules and regulations of any plant or facility where employed shall be complied with at all times. Adequate safety equipment must be furnished by the Employer for Employees protection and used as directed. Questionable safety measures shall be referred to the Joint Trades Board.

Employer shall furnish gloves on foamglass jobs and on jobs where metal lath backed insulation is used; saws on foamglass jobs, and fans or blowers for ventilation in attics or skirts of towers or other locations when needed. Maximum size of buckets on all jobs shall be 12 quarts. Employer shall provide adequate facilities for changing clothes on industrial jobs and facilities for storing tools on all jobs. Employer shall furnish ice water on all jobs.

Adequate scaffolding shall be provided on all jobs. On operations twenty (20) feet or more above the ground level, scaffolding shall consist of not less than two (2) 2" x 10" walk boards tied together side by



each A 2" x 4" or equivalent guard rail shall be provided on each landing.

All tools and equipment furnished by the Employer shall be charged to the Employee when issued to him and full credit will be given the Employee upon return of the tools and equipment.

#### ARTICLE XVI

The Union shall have a permanent office address with telephone service, where their Business Agent or authorized officer can be communicated with between 8 A. M. and 4:30 P. M. each working day for the purpose of answering inquiries and providing necessary service to the trade.

#### ARTICLE XVII

The Union agrees there shall be no limitations or restrictions placed upon the individual working efforts of employees.

#### ARTICLE XVIII

The term of this Agreement shall commence on the 1st day of July, 1962, and shall continue in effect until midnight on the 30th day of June, 1965, and shall renew itself for terms of one (1) year, from year to year thereafter, unless either the Employer or the Union shall give notice in writing to the other not less than ninety (90) days prior to the 30th day of June, 1965, or any annual expiration date thereafter, of its desire to terminate, modify or change this Agreement. If such notice shall have been given, it shall pertain to such Agreement in its entirety.

## ARTICLE XIX

This Agreement shall be signed by each Employer and be executed by the President and Secretary or such other officers as are deemed necessary and authorized to do so by Local Union No. 22 of the International Association of Heat and Frost Insulators and Asbestos Workers.

## ARTICLE XX

Any portion of this Agreement found to be in violation of existing federal or state law shall become inoperative and the balance of the Agreement as such continue in full force and effect until date of expiration.

Signed:

**HOUSTON INSULATION AND CONTRACTORS  
ASSOCIATION**

Employer

Per J. K. Dixon

Per C. E. Foster, Secy.-Treas.

**INTERNATIONAL ASSOCIATION OF HEAT  
AND FROST INSULATORS AND ASBESTOS  
WORKERS LOCAL UNION NO. 22.**

Per R. L. Mooney, Jr.  
President

Per Brooks Baker  
Secretary

Witnessed by:

**MEMBERS OF HOUSTON INSULATION  
CONTRACTORS ASSOCIATION AGREEMENTS  
ORIGINALLY SIGNED BY THE FOLLOWING:**

**B & B ENGINEERING AND  
SUPPLY COMPANY, INC.**

By Wm. Murfin

**THE ABER COMPANY**

By Paul E. Petrofsky

**ARMSTRONG CONTRACTING  
AND SUPPLY COMPANY**

By Claude E. Foster

**MUNDET CORK  
CORPORATION**

By E. J. Stansbury

**THE INDUSTRIAL  
INSULATORS, INC.**

By George Dabney

**PRECISION INSULATING  
COMPANY, INC.**

By J. K. Dixon

**JOHNS-MANVILLE SALES  
CORP.**

By R. A. Stapleton

147  
CHARGING PARTY'S EXHIBIT No. 2

|          |    |    |                         |                |
|----------|----|----|-------------------------|----------------|
| 9-10-37  | 12 | 5  | Per Capita Tax          | 40.00          |
| 9-24-37  | 13 | 6  | Telephone               | 3.50           |
|          |    |    |                         | <u>\$65.70</u> |
| 10-1-37  | 14 | 7  | Hall Rent               | 10.00          |
| "        | 15 | 8  | Business Agent Expenses | 14.58          |
| 10-12-37 | 16 | 9  | Per Capita Tax          | 32.00          |
| 10-25-37 | 17 | 10 | Telephone               | 4.60           |
|          |    |    |                         | <u>\$61.18</u> |

Pay all Bills by Check Only



in p. 112



DECAH RECORDS

1-1-1962

RESPONDENT'S  
EXHIBIT  
NO. 1

00

20

00

50

70

00

58

00

60

18



# DECAH (EXPENSE BOOK)

| Date     | Fill<br>No. | Check<br>No. | ASSIGNED TO<br>Nature of Expense | MEMBER | Company<br>Amount |
|----------|-------------|--------------|----------------------------------|--------|-------------------|
| 1/13/62  |             | 7001-3       | M. I. Simpson                    |        | FALLER<br>AUSTIN  |
| 1/16     |             | 7004-28      | E. H. Shipley                    |        | B+B               |
| 2-22/62  |             | 7029-30      | G. H. Shipley                    |        | B+B               |
| 3-7-62   |             | 7030-64      | R. C. Oliver                     |        | J. M.             |
| 3-12-62  |             | 7065-75      | D. J. Guidry                     |        | B+B               |
| 3-20-62  |             | 7076-83      | D. J. Guidry                     |        | B+B               |
| 3-29-62  |             | 7084-7185    | R. C. Oliver                     |        | THORPE            |
| 4-3-62   |             | 7186-7205    | B. A. Broussard                  |        | ABC               |
| 4-5-62   |             | 7206-7500    | B. A. Broussard                  |        | ABC               |
| 4-6-62   |             | 7500-8500    | B. A. Broussard                  |        | ABC               |
| 4-9-62   |             | 7206-7156    | R. C. Oliver                     |        | THORPE            |
| 4-25-62  |             | 7257-7260    | R. C. Oliver                     |        | THORPE            |
| 4-25-62  |             | 8501-8530    | R. C. Oliver                     |        | THORPE            |
| 6-13-62  |             | 8531-8630    | B. L. FAUTHEREE                  |        | PRECISION         |
| 6-19-62  |             | 8631-8855    | B. L. FAUTHEREE                  |        | PRECISION         |
| 6-19-62  |             | 8856-8865    | J. A. Cormier                    |        | J. M.             |
| 6-22-62  |             | 8866-8999    | R. C. Oliver                     |        | THORPE            |
| 7-28-62  |             | 8900-8903    | Bill Lee                         |        | IND.              |
| 9-20-62  |             | 8904-8920    | R. S. Pardon                     |        | IND.              |
| 9-20-62  |             | 8921-8925    | H. C. Hanks                      |        | IND.              |
| 9-25-62  |             | 76501-77000  | R. S. Pardon                     |        | IND.              |
| 10-23-62 |             | 8926-8992    | R. S. Pardon                     |        | IND.              |
| 10-24-62 |             | 77001-77059  | R. S. Pardon                     |        | IND.              |

# DEAL (EXPENSE BOOK)

| Date   | Bill<br>No.   | Check<br>No. | Assigned To<br>Nature of Expense | Company<br>Amount |
|--------|---------------|--------------|----------------------------------|-------------------|
| 3/3-63 | 102863-102903 |              |                                  | 150               |
|        |               |              |                                  | Returned          |
|        |               |              |                                  | 263               |



(EXPENSE BOOK)

151

| Date     | Bill No. | Check No.     | Assignee Nature of Expense | Cash Amount |
|----------|----------|---------------|----------------------------|-------------|
| 10-31-62 |          | 892624w-89363 | Credited to R.G. Aden      | IND.        |
| 11-3-62  |          | 771234w-77239 | U.A. MARTIN                | IND.        |
| 11-5-62  |          | 8926-8936     | U.A. MARTIN                | IND.        |
| 11-14-62 |          | 77061-77114   | V.C. Martin                | IND.        |
| 11-26-62 |          | 77060-77135   | V.A. MARTIN                | IND.        |
| 12-13-62 |          | 77337-77407   | V.A. MARTIN                | IND.        |
| 12-28-62 |          | 77408-77409   | V.A. MARTIN                | IND.        |
| 1-11-63  |          | 77610-77760   | ROBERT OLIVER              | J.M.        |
| 1-29-63  |          | 77761-77837   | GEO. CIMERHANZEL           | B&B         |
| 1-29-63  |          | 77838-78000   | GEO. CIMERHANZEL           | B&B         |
| 1-29-63  |          | 78001-78500   | GEO. CIMERHANZEL           | B&B         |
| 1-29-63  |          | 78501-79000   | GEO. CIMERHANZEL           | B&B         |
| 2-6-63   |          | 102501-102502 | Bobby R. SANFORD           | IND.        |
| 2-26-63  |          | 102503-102823 | GEO. CIMERHANZEL           | B&B         |
| 2-28-63  |          | 102904-103000 | J.E. PITTMAN               | J.M.        |
| 2-28-63  |          | 103001-103104 | J.E. PITTMAN               | J.M.        |
| 3-12-63  |          | 103501-104000 | A.J. BURKE                 | W.H. HOWARD |
| 3-26-63  |          | 103105-103107 | AMOS WALLACE               | J.M.        |
| 3-27-63  |          | 102813-102892 | H.F. Childers              | J.M.        |
| 3-28-63  |          | 103108-103222 | R.C. OLIVER                | J.M.        |
| 3-28-63  |          | 102893-102909 | N.C. TELGE                 | MUNDET      |
| 3-29-63  |          | 103224-103317 | N.C. TELGE                 | MUNDET      |
| 4-5-63   |          | 104001-104500 | ROBERT OLIVER              | J.M.        |
| 4-16-63  |          | 103319-103333 | ROBERT OLIVER              | J.M.        |

(EXPENSE BOOK)

| Date   | Bill<br>No. | Check<br>No. | Nature of Expense | Amount |
|--------|-------------|--------------|-------------------|--------|
| 7-3-63 |             | 164001-      | RECEIVED          | 152    |



## (EXPENSE BOOK,

153

| Date    | Bill No. | Check No. | Nature of Expense | Amount    |
|---------|----------|-----------|-------------------|-----------|
| 4-18-63 | 1622521  | 163000    | Robert Oliver     | J.M.      |
| 4-26-63 | 163334   | 103498    | Robert Oliver     | J.M.      |
| 4-29-63 | 162011   | 162015    | Leo Grein         | Precision |
| 5-1-63  | 162016   | 162023    | Leo Grein         | Precision |
| 5-7-63  | 162024   | 162057    | Robert Oliver     | J.M.      |
| 5-9-63  | 162058   | 162265    | Robert Oliver     | J.M.      |
| 5-13-63 | 162266   | 162318    | J.L. Richardson   | ARM.      |
| 5-13-63 | 162318   | 162320    | J.M. Jones        | BXB       |
| 5-14-63 | 162321   | 162328    | J.M. Jones        | BXB       |
| 5-20-63 | 16329    | 163429    | E.O. FERNAND      | AMERICAN  |
| 5-23-63 | 16436    | 16473     | Robert Oliver     | J.M.      |
| 5-29-63 | 162474   | 162500    | Robert Oliver     | J.M.      |
| 5-29-63 | 163001   | 163125    | Robert Oliver     | J.M.      |
| 6-5-63  | 163125   | 163237    | Robert Oliver     | J.M.      |
| 6-7-63  | 163238   | 163363    | J.S. Morton       | F.A.      |
| 6-13-63 | 163364   | 163407    | Robert Oliver     | J.M.      |
| 6-18-63 | 163408   | 163508    | Richard Owens     | Precision |
| 7-8-63  | 163509   | 163659    | Gilbert Leleaux   | AMERICAN  |
| 7-15-63 | 163660   | 163713    | Gilbert Leleaux   | AMERICAN  |
| 7-19-63 | 163714   | 163864    | J.B. Fortier      | Precision |
| 7-19-63 | 164001   | 164401    | P.C. Oliver       | J.M.      |
| 7-23-63 | 164402   | 164452    | Gilbert Leleaux   | AMERICAN  |
| 8-9-63  | 164453   | 164464    | Robert Oliver     | J.M.      |
|         |          |           | R.F. Cash         | BXB       |



(EXPENSE BOOK)

| Date | Bill No. | Check No.    | Nature of Expense | Amount |
|------|----------|--------------|-------------------|--------|
| 1-3  |          | 143265-16460 | R. M. CRASH       | 64.42  |

[fol. 157]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 21,910

---

HOUSTON INSULATION CONTRACTORS ASSOCIATION, Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, Respondent.

---

ORDER TO FILE PETITION—Filed September 27, 1964

A Petition for Review of an Order of the National Labor Relations Board made on September 4, 1964 in the proceeding known upon the records of the Board as Case No. 23-CC-133 having been presented to the Court;

It Is Ordered that said Petition be filed and docketed as of September 17, 1964; and

It Is Further Ordered that a copy of this order and said Petition be forthwith served on the National Labor Relations Board, and that said Board, upon service of such copies, forthwith certify and file in this Court, a transcript of proceedings, or in lieu thereof, a certified list of all documents, transcripts of testimony, exhibits and other material comprising the record of the proceedings before the National Labor Relations Board in the [fol. 158] above entitled matter within forty (40) days from this date as required by Rule 38, as amended.

Edward W. Wadsworth, Clerk of the United States  
Court of Appeals for the Fifth Circuit;

Clara R. James, Chief Deputy Clerk for the Court  
by direction.

[fol. 159]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,910

HOUSTON INSULATION CONTRACTORS ASSOCIATION, Petitioner,  
versus

NATIONAL LABOR RELATIONS BOARD, LOCAL 22, INTERNATIONAL  
ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS  
WORKERS, LOCAL 113, INTERNATIONAL ASSOCIATION OF  
HEAT AND FROST INSULATORS AND ASBESTOS WORKERS,  
INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSU-  
LATORS, AFL-CIO, Respondents.

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO PETI-  
TION FOR REVIEW AND TO SET ASIDE AN ORDER OF THE  
BOARD—Filed October 28, 1964

The National Labor Relations Board, pursuant to the  
National Labor Relations Act, as amended (61 Stat. 136,  
73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*, files this An-  
swer to the petition to review and set aside its order  
issued on September 4, 1964.

1. The Board admits the allegations relating to parties  
contained in that section of the petition for review labeled  
"The Parties."

[fol. 160] 2. The Board admits the allegations relating  
to jurisdiction of this Court contained in the section labeled  
"Jurisdiction and Venue" of the petition for review.

3. With respect to the allegations contained in that  
section of the petition for review labeled "Statement of  
Proceedings," the Board prays reference to the certi-

fied transcript of record for a full and exact statement of the pleadings, evidence, findings of fact, conclusions of law and order of the Board, and all other proceedings had in this matter.

4. With respect to the allegations contained in that section of the petition for review labeled "Assignments of Error," the Board denies each and every allegation of error.

5. Further answering, the Board avers that the proceedings had before it, the findings of fact, the conclusions of law and order of the Board were and are in all respects proper under the Act.

6. Pursuant to Section 10(f) of the Act, the Board is certifying and filing herewith a certified record of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceedings before the Board.

Wherefore, the Board prays that this Court cause a copy of this Answer to be served upon petitioner and [fol. 161] that this Court enter a decree denying the petition for review and to set aside the Board's order.

Marcel Mallet-Prevost, Assistant General Counsel,  
National Labor Relations Board.

Dated at Washington, D. C., October 26, 1964.



[fol.162]

## BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS  
AGENTS—August 8, 1963

Instructions: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in Item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Do Not Write In This Space

Case No.  
23-CA-133

Dated Filed  
August 8, 1963

1. Labor Organization Of Its Agents Against Which  
Charge Is Brought

Name

International Association of Heat and Frost Insulators  
and Asbestos Workers, AFL-CIO and Local 22 and  
Local 113 of said International Association.

Address

Int'l: Machinists Bldg. 1300 Connecticut Ave., Wash-  
ington 6, D. C. Local 22: 4717 Gulf Freeway, Houston,  
Texas

Local 113: 850 Omaha, Corpus Christi, Texas

[fol.163] The above-named organization(s) or its agents  
has (have) engaged in and is (are) engaging in unfair  
labor practices within the meaning of Section 8(b) subsec-  
tions(s) (4)(i)(ii)(B) of the National Labor Relations  
(List subsections)

Act, and these unfair labor practices are unfair labor prac-  
tices affecting commerce within the meaning of the act.



2. Basis of the charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about July 2, 1963, and at all times thereafter, members of the Houston Insulation Contractors Association and their respective employees were induced or encouraged to engage in a refusal in the course of their employment to use, process, transport or otherwise handle or work on any goods, articles, materials or commodities or to perform any services on the products of the Thorpe Products Company and the Techalloy Company by the above-named labor organizations and by their officers, agents and representatives.

Since on or about July 2, 1963, members of the Houston Insulation Contractors Association and their respective employees were threatened, coerced, or restrained from the handling of the materials furnished by the Thorpe Products Company and the Techalloy Company by the above-named labor organizations and their officers, agents and representatives with an object thereof being to force or require the Houston Insulation Contractors Association members and their employees to cease using, handling, transporting or otherwise dealing in the products of the [fol. 164] Thorpe Products Company and the Techalloy Company and to cease doing business with them.

3. Name of Employer

Houston Insulation Contractors Association

4. Location of plant involved (Street, City, and State)

P. O. Box 14009, Houston, Texas

5. Type of Establishment (Factory, mine, wholesaler, etc.)

Association of Contractor Employers

6. Identify Principal Product or Service

7. No. of Workers Employed

400

8. Full Name of Party Filing Charge  
Houston Insulation Contractors Association
9. Address of Party Filing Charge (Street, City, and State)  
P. O. Box 14009, Houston, Texas
10. Tel. No.  
RI 7-5530  
Mr. Foster
11. Declaration

[fol. 165] I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

(Signed) WILLIAM DEAKINS

(Signature of representative  
or person making charge)

William Deakins

Attorney

(Title or office, if any)

August 8, 1963

Willfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 1001)

[fol. 166]

## BEFORE THE NATIONAL LABOR RELATIONS BOARD

## TWENTY-THIRD REGION

## In the Matter of

International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO; Local 22, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO; Local 113, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO (Armstrong Contracting and Supply Corporation) (Johns-Manville Sales Corporation) (Thorpe Products Company) (Techalloy Company, Incorporated) and Houston Insulation Contractors Association.

## COMPLAINT AND NOTICE OF HEARING—September 5, 1963

It having been charged by Houston Insulation Contractors Association herein called Houston Insulation, that International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, herein called the Respondent International; Local 22, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, herein called Respondent Local 22; and Local 113, International Association of Heat and Frost Insulators and [fol. 167] Asbestos Workers, AFL-CIO, herein called Respondent Local 113; have engaged in, and are engaging in, certain unfair labor practices affecting commerce as set forth in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for the Twenty-third region, pursuant to Section 10 (b) of the Act and the Board's Rules and Regulations, Series 8, Section 102.15, hereby issues

this Complaint and Notice of Hearing and alleges as follows:

1. The original charge was filed by Houston Insulation on August 8, 1963, and was served on Respondents International, Local 22 and Local 113 by mailing a true copy thereof to them via registered United States mail on August 8, 1963.

2. (a) Houston Insulation, a Texas corporation, with its principal office and place of business at Houston, Texas, is an Association of employees engaged in the sale, distribution and installation of insulation products to and for employees engaged in interstate commerce and in the building and construction industry principally at Houston, Galveston, Beaumont, and Port Arthur, Texas, and exists for the purpose, *inter alia*, of negotiating and administering collective bargaining agreements with Respondent Local 22 made for and on behalf of its Member Employers, who in the course and conduct of their business operations annually sell, distribute and install insulation products to and for employers engaged in interstate commerce and in the building and construction industry in an amount in the aggregate valued at in excess of \$10,000,000.

[fol. 168] (b) Armstrong Contracting and Supply Corporation, herein called Armstrong, a Member Employer of Houston Insulation, and a subsidiary of Armstrong Cork Company with principal offices at Lancaster, Pennsylvania, is a Delaware corporation, and is engaged at Houston, Texas, in the sale and installation of industrial insulation products, pursuant to contract, in the building and construction industry, from which business it annually sells and ships products outside the State of Texas valued in excess of \$50,000.

(c) Johns-Manville Sales Corporation, herein called Johns-Manville, a Member Employer of Houston Insulation, is a Delaware corporation with principal offices in



the State of New York and branch offices in several States including the State of Texas, and is engaged at Houston, Texas, in the manufacture and sale of insulation material, pursuant to contract and distributorship basis, in the building and construction industry, from which business it annually sells and ships products outside the State of Texas valued at in excess of \$50,000.

(d) Thorpe Products Company, Division of J. T. Thorpe Company, Inc., herein called Thorpe, is a Texas corporation, and is engaged at Houston, Texas, in the distribution and fabrication of insulation products to and for insulation contractors and industrial employers, engaged in the building and construction industry, from which business it annually sells and ships products outside the State of Texas valued at in excess of \$50,000.

(e) Techalloy Company, Incorporated, herein called Techalloy, is a Pennsylvania corporation with principal offices in the State of Pennsylvania and branch offices [fol. 169] in the State of Connecticut, New York, Illinois, California, Georgia and Texas, and is engaged at Houston, Texas in conversion (redraw and reroll) of stainless steel and high nickel alloy, and in the sale and distribution of its products to insulation contractors, engaged in the building and construction industry, and to industrial employers, from which business it annually sells and ships products outside the State of Texas valued at in excess of \$50,000.

3. (a) In the course of its business, Thorpe, regularly sells mitred fittings to Armstrong, and at all times material herein, Armstrong purchased said mitred fittings for use in the performance of its insulation contract on construction of a new ammonia plant for E. I. DuPont De Nemours and Company at Victoria, Texas.

(b) At all times material herein, and in the performance of its contract to furnish insulation on an applied basis at the American Oil Company, Barge Pipe Ammonia loading dock at Texas City, Texas, Johns-Manville purchased



pre-cut stainless steel bands to hold insulation on pipe lines from Techalloy.

4. (a) The building and construction industry is an "industry affecting commerce" within the meaning of Section 8(b)(4)(i)(ii)(B) of the Act.

(b) Houston Insulation, Armstrong, Johns-Manville, Thorpe, and Techalloy are, and have been at all times material herein, persons within the meaning of Section 2(1) of the Act, and employers engaged in commerce or in an industry affecting commerce within the meaning of Section 2 (6) and (7) of the Act, respectively.

[fol. 170] 5. Respondents International, Local 22, and Local 113 are, and have been at all times material herein, labor organizations within the meaning of Section 2 (5) of the Act.

6. At all times material herein, the following named persons occupied positions set opposite their respective names, and have been and are now agents of Respondents International, Local 22, and Local 113, acting on behalf of said labor organizations, and are agents within the meaning of Section 2(13) of the Act:

Brooks Baker—Vice President, Respondent International  
Secretary, Respondent Local 22

Joe Schrode—Business Agent,  
Respondent Local 22

J. R. Eaton—Business Agent,  
Respondent Local 113

7. Respondent Local 22 is the collective bargaining representative of the employees of Armstrong and Johns-Manville.

8. Respondents International, Local 22, and Local 113 are not certified as the collective bargaining representative of the employees of Thorpe and Techalloy individually or collectively, under the provisions of Section 9 of the Act, and at no time material herein have said Respondents

been recognized as the collective bargaining agent of the employees of Thorpe and Techalloy, nor have said Respondents made any demands on Thorpe and Techalloy that they be recognized as bargaining agents.

[fol. 171] 9. At no time material herein has Respondent International, Respondent Local 22 or Respondent Local 113 had any labor dispute with Armstrong or Johns-Manville.

10. At all times material herein, Respondents International, Local 22, and Local 113 have been engaged in a boycott of the products manufactured by Thorpe and Techalloy, and sold by them to Armstrong and Johns-Manville, as set forth in paragraph 3 (a) and (b) above, said boycott by Respondents being engaged in by them for the reasons set forth in paragraph 8 above, and the failure of said products to include thereon a label or decal signifying them to be products made by employee members of Respondent Local 22, or by employee members of other local union affiliated with Respondent International.

11. Commencing on or about May 28, 1963, and continuing to date, Respondents International, Local 22, and Local 113, by their officers, agents, and representatives, in furtherance of the aforesaid boycott of Thorpe's and Techalloy's products, have induced and encouraged, and are inducing and encouraging, individuals employed by Armstrong and Johns-Manville at the construction sites set out in paragraph 3(a) and (b) above to engage in a strike or refusal in the course of their employment to perform any service for their respective employers, and threatened, coerced and restrained Armstrong, Johns-Manville, and Houston Insulation and its other Member Employees by:

(a) J. R. Eaton, on or about May 28, 1963, and again on or about the latter part of June or early part of July 1963, the exact date being unknown, directed, instructed, [fol. 172] requested and appealed to the foreman of Arm-

strong, and its employees, at the construction field office and at its project site set out in paragraph 3(a) above, and at the Corpus Christi, Texas, union hall of Respondent Local 113, not to install any mitred fittings on same project since they did not have affixed thereon a union label; not to install any mitred fittings on said construction project unless made or fabricated at the job site; and informed said foreman and employees, "any man caught putting these fittings on would have charges filed against him."

(b) J. R. Eaton, on or about the latter part of June or early part of July 1963, the exact date being unknown, informed the Houston, Texas, Branch Manager of Armstrong, and the foreman of Armstrong, at the Victoria, Texas, field office of Lummis Company, the general contractor of the construction project set out in paragraph 3(a) above, that Armstrong's employees would not "touch" or install any fittings on said construction project unless said fittings had affixed thereto a union label or decal, and further informed them that reference the insistence of Respondent Local 113 in this matter, "The situation still stands as it is."

(c) Joe Shrode, on or about July 19, 1963, at a union meeting at the union hall of Respondent Local 22, Houston, Texas, directed, instructed, requested and appealed to the foreman of Johns-Manville, and its employees, at the project site set out in paragraph 3(b) above, to refuse to install any pre-cut stainless steel bands known to Joe Shrode that they were already purchased pre-cut by Johns-Manville, if said pre-cut stainless bands arrived on said construction [fol. 173] project without having affixed thereon a union label or decal.

(d) Joe Shrode, on or about July 30, 1963, informed the Contract Manager of the Houston, Texas, district of Johns-Manville, at Houston, Texas, that the employees of Johns-Manville, at the construction project set out in paragraph 3(b) above, refused to install on arrival at the said

construction project said pre-cut stainless steel bands on or about July 23, 1963, by reason that the work of cutting coil stock for the bands into pre-determined lengths was that of Respondent Local 22; that Johns-Manville must not use purchased pre-cut stainless steel bands on its construction projects; and that Johns-Manville could not use on the said construction project, or in any construction project, said pre-cut stainless steel bands since employee-members of Respondent Local 22 would not put union labels on them.

(e) Brooks Baker and Joe Shrode, on or about June 3, 1963, at a joint meeting in Houston, Texas, of Respondents International and Local 22 with Houston Insulation and its Member-Employers, and Brooks Baker, on or about July 2, 1963, at a joint meeting in Houston, Texas, of Respondents International and Local 22 with Houston Insulation and its Member-Employers, informed Armstrong, Johns-Manville, and Houston Insulation and its other Member-Employers—B&B Engineering & Supply Company, Inc., The Aber Company, Inc., Mundet Cork Corporation, The Industrial Insulators, Inc., and Precision Insulating Company, Inc.,—that no shop fabricated fittings or other shop fabricated items would be installed by employee-members of Respondents International, Local 22, and Local 113 [fol. 174] or any construction projects engaged in by the aforesaid employers without a union label or decal being affixed to each shop fabricated fitting or other shop fabricated items.

12. By the acts and conduct described in paragraph 11 above, and by other acts and conduct, Respondents International, Local 22, and Local 113 have engaged in, and have induced and encouraged individuals employed by Armstrong, Johns-Manville, and by other persons engaged in commerce or in industries affecting commerce, to engage in, strike or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities or to perform services, and have threatened, coerced and



restrained Armstrong, Johns-Manville, and other persons engaged in commerce or in industries affecting commerce.

13. An object of the acts and conduct of Respondents International, Local 22, and Local 113 as set forth in paragraphs 11 and 12 above, was and is to force or require Armstrong, Johns-Manville, and other persons engaged in commerce, or in an industry affecting commerce, to cease using, selling, handling, transporting, or otherwise dealing in products of, and to cease doing business with Thorpe and Techalloy.

14. By the acts and conduct engaged in by Respondent International, Local 22, and Local 113 as set forth in paragraph 13 above, Respondents International, Local 22 and Local 113 did engage in, and are engaging in, unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B), and Section 2 (6) and (7) of the Act.

[fol. 175] 15. The acts of Respondents International, Local 22, and Local 113 described in paragraphs 11 and 12 above, occurring in connection with the operations of Houston Insulation, Armstrong, Johns-Manville, Thorpe, and Techalloy described in paragraphs 2, 3 and 4 above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

16. The acts of Respondents International, Local 22, and Local 113 described above constitute unfair labor practices affecting commerce within the meaning of Section (8b)(4)(i) and (ii)(B), and Section 2 (6) and (7) of the Act.

Please Take Notice that on the 10th day of October, 1963, at 10:00 o'clock in the forenoon (C.S.T.), in Room 7620, Federal Office Building, 515 Rusk Avenue, Houston, Texas, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time



and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Respondents shall file with the undersigned Acting Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof and that unless they do so all of the allegations in the Complaint shall be deemed to be admitted to [fol. 176] be true and may be so found by the Board.

Dated At Houston, Texas this 5th day of September, 1963.

James R. Webster, Acting Regional Director, National Labor Relations Board, Twenty-third Region, 6617 Federal Building, 515 Rusk Avenue, Houston 2, Texas.

---

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ANSWER OF RESPONDENT INTERNATIONAL UNION

The International Association of Heat and Frost Insulators and Asbestos Workers (hereinafter referred to as "Respondent") hereby files this answer pursuant to Sections 102.20 and 102.21 on the Rules and Regulations of the National Labor Relations Board.

1.

Respondent admits the facts alleged in Paragraph 1 of the complaint.

[fol. 177]

2.

(a) Respondent admits the facts alleged in Paragraph 2(a) of the complaint.

(b) Respondent admits the facts alleged in Paragraph 2(b) of the complaint.

(c) Respondent admits the facts alleged in Paragraph 2(c) of the complaint.

(d) Respondent admits the facts alleged in Paragraph 2(d) of the complaint.

(e) Respondent admits the facts alleged in Paragraph 2(e) of the complaint.

3.

(a) Respondent admits the allegation that Thorpe regularly sells mitred fittings to Armstrong. Respondent is without knowledge or information sufficient to form a belief as to the remaining allegations of Paragraph 3(a) of the complaint.

(b) Respondent is without knowledge or information sufficient to form a belief as to the allegations of Paragraph 3(b) of the complaint.

4.

(a) Paragraph 4(a) of the complaint states a conclusion of law, not material to the issues.

[fol. 178] (b) Respondent admits the facts alleged in Paragraph 4(b) of the complaint.

5.

Respondent admits the facts alleged in Paragraph 5 of the complaint.

6.

Respondent admits the facts alleged in Paragraph 6 of the complaint, insofar as they allege that the named persons are agents and acting on behalf of the organization for whom they occupied positions.

## 7.

Respondent admits the facts alleged in Paragraph 7 of the complaint.

## 8.

Respondent admits the facts alleged in Paragraph 8 of the complaint and further states that at no time material has Respondent had any labor dispute with Thorpe or Techalloy.

## 9.

Respondent denies the facts alleged in Paragraph 9 of the complaint.

[fol. 179]

## 10.

Respondent denies the facts alleged in Paragraph 10 of the complaint.

## 11.

(a) Respondent denies each fact alleged in Paragraph 11(a) of the complaint.

(b) Respondent denies each fact alleged in Paragraph 11(b) of the complaint.

(c) Respondent denies each fact alleged in Paragraph 11(c) of the complaint.

(d) Respondent denies each fact alleged in Paragraph 11(d) of the complaint.

(e) Respondent denies each fact alleged in Paragraph 11(e) of the complaint.

## 12.

Respondent denies each fact alleged in Paragraph 12 of the complaint.

13.

Respondent denies each fact alleged in Paragraph 13 of the complaint.

14.

Respondent denies each fact alleged in Paragraph 14 of the complaint.

[fol. 180]

15.

Respondent denies each fact alleged in Paragraph 15 of the complaint.

16.

Respondent denies each fact alleged in Paragraph 16 of the complaint.

Sherman, Dunn & Sickles, Joseph A. Sickles, 1200-15th Street, N. W., Washington 5, D. C., Attorney for Respondent International.

Washington, D. C.

Certificate of Service (omitted in printing).

[fol. 181]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

#### ANSWER TO COMPLAINT

Comes Now Respondents Local 22 and Local 113, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO and in answer to the complaint heretofore filed in the above styled and numbered case, files their answer as follows:

1. The allegations in Paragraph 1 are admitted.
2. (a) The allegations in Paragraph 2(a) are admitted.  
(b) The allegations contained in Paragraph 2(b) are admitted.

(c) The allegations contained in Paragraph 2(c) are admitted.

(d) The allegations contained in Paragraph 2(d) are admitted.

(e) The allegations contained in Paragraph 2(e) are admitted.

3. (a) The allegations contained in Paragraph 3(a) are denied.

(b) The allegations contained in Paragraph 3(b) are neither admitted nor denied because Respondents have no information regarding such allegations.

[fol. 182] 4. (a) The allegations contained in Paragraph 4(a) are admitted.

(b) The allegations contained in Paragraph 4(b) are admitted.

5. The allegations contained in Paragraph 5 are admitted.

6. The allegations contained in Paragraph 6 are admitted.

7. The allegations contained in Paragraph 7 are admitted.

8. The allegations contained in Paragraph 8 are admitted.

9. The allegations contained in Paragraph 9 are admitted.

10. The allegations contained in Paragraph 10 are denied.

11. The allegations contained in Paragraph 11 are denied.

(a) Respondent Local 113 admits that J. R. Eaton on or about the dates alleged requested and appealed to the foreman of Armstrong and its employees not to install any



mitred fittings on said project which had not been made or fabricated by Armstrong. Other than as admitted above, the remaining allegations of said Paragraph are denied.

[fol.183] (b) Respondent Local 113 admits that J. R. Eaton on or about the latter part of June or early part of July, 1963 informed the Houston Texas Branch Manager of Armstrong and the foreman of Armstrong at the Victoria Texas Field Office that Armstrong's employees would not install any mitred fittings on said construction project which had been pre-fabricated by any other company in violation of Armstrong's contract with Respondent Local 22. Other than as admitted above, Respondent denies the allegations contained in Paragraph 11(b).

(c) Respondent Local 22 admits that Joe Shrode requested and appealed to the foreman of Johns-Manville and its employees to refuse to install any pre-cut steel bands which had been purchased by Johns-Manville from another concern in violation of Johns-Manville's agreement with Respondent Local 22. Other than as admitted above, Respondent denies the allegations contained in Paragraph 11(c).

(d) Respondent Local 22 admits that Joe Shrode on or about July 30, 1963 informed the contract Manager of Johns-Manville at Houston, Texas of its obligations under the agreement between Respondent Local 22 and Johns-Manville to the effect that Johns-Manville was not to sub-contract or sub-let the cutting of stainless steel to any other contractor. Respondent further admits that Joe Shrode stated that Johns-Manville's employees, in an effort to enforce its agreement with Johns-Manville, would not handle any pre-cut stainless steel bands from any other concern. Other than as admitted above, Respondent denies the allegations contained in Paragraph 11(d).

[fol.184] (e) Respondent Local 22 admits that Brooks Baker and Joe Shrode on or about June 3, 1963 and on or about July 2, 1963 at a meeting with members of Houston Insulation informed the members thereof that Article VI

of the current agreement states that Respondents were going to seek strict compliance with Article VI of its current agreement to the effect that members of Houston Insulation were not to sub-let or sub-contract any work of the insulators as contained in said agreement. Respondents further admit that on both of the above referred to occasions Brooks Baker and Joe Shrode attempted to discuss methods of identifying shop fabricated fittings or other shop fabricated items in an effort to enforce compliance with the above referred to contractual provision. Other than as admitted above, Respondents deny the allegations contained in Paragraph 11(e).

12. The allegations contained in Paragraph 12 are denied.

13. The allegations contained in Paragraph 13 are denied.

14. The allegations contained in Paragraph 14 are denied.

15. The allegations contained in Paragraph 15 are denied.

16. The allegations contained in Paragraph 16 are denied.

[fol.185] Wherefore, premises considered, Respondents pray that the above complaint be dismissed.

Combs & Mitchell, State National Building, Houston  
2, Texas, Attorneys for Respondents, Local 22 and  
Local 113, International Association of Heat and  
Frost Insulators and Asbestos Workers, AFL-  
CIO.

L. J. Mitchell

[fol. 186]

## BEFORE THE NATIONAL LABOR RELATIONS BOARD

TXD-43-64

Houston, Texas

## TRIAL EXAMINER'S DECISION—February 3, 1964

Arthur Safos, Esq., of Houston, Tex., for the General Counsel.

Vinson, Elkins, Weems & Searls, Esqs. by W. D. Deakins, Jr. Esq., of Houston, Tex., for the Charging Party.

Sherman, Dunn & Sickles, Esqs., by Joseph A. Sickles, Esqs., of Washington, D. C., for the Respondent International.

Combs & Mitchell, Esqs., by Thomas J. Mitchell, Esq., of Houston, Tex., for Locals 22 and 113.

Before: John F. Funke, Trial Examiner.

## Statement of the Case

Upon a charge filed August 8, 1963,<sup>1</sup> by Houston Insulation Contractors Association, herein the Contractors Association, against International Association of Heat and Frost Insulators and Asbestos Workers, and Local 22 and Local 113, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, herein Locals 22 and 113, or collectively as the Respondents, the General Counsel issued complaint alleging Respondents violated Section 8(b)(4)(i) and (ii) (B) of the Act.

The answers of Respondents denied the commission of unfair labor practices.

[fol. 187] Upon the entire record in this case and from my observation of the witnesses, I make the following:

---

<sup>1</sup> Unless otherwise noted all dates refer to 1963.

## Findings and Conclusions

### I. The business of the Companies

Houston Insulation, a Texas corporation, with its principal office and place of business at Houston, Texas, is an Association of employers engaged generally in the sale, distribution and installation of insulation products to and for employers engaged in interstate commerce and in the building and construction industry principally at Houston, Galveston, Beaumont, and Port Arthur, Texas, and exists for the purpose, *inter alia*, of negotiating and administering collective-bargaining agreements with Respondent Local 22 made for and on behalf of its Member Employers, who in the course and conduct of their business operations annually sell, distribute and install insulation products to and for employers engaged in interstate commerce and in the building and construction in an amount in the aggregate valued at in excess of \$10,000,000.

Armstrong Contracting and Supply Corporation, herein called Armstrong, a Member Employer of Houston Insulation, and a subsidiary of Armstrong Cork Company with principal offices at Lancaster, Pennsylvania, is a Delaware corporation, and is engaged at Houston, Texas, in the sale and installation of industrial insulation products, pursuant to contract, in the building and construction industry, from [fol.188] which business it annually sells and ships products outside the State of Texas valued at in excess of \$50,000.

Johns-Manville Sales Corporation, herein called Johns-Manville, a Member Employer of Houston Insulation, is a Delaware corporation with principal offices in the State of New York and branch offices in several States including the State of Texas, and is engaged at Houston, Texas, in the manufacture and sale of insulation material, pursuant to contract and distributorship basis, in the building and construction industry, from which business it annually sells



and ships products outside the State of Texas valued at in excess of \$50,000.

Thorpe Products Company, Division of J. T. Thorpe Company, Inc., herein called Thorpe, is a Texas corporation, and is engaged at Houston, Texas, in the distribution and fabrication of insulation products to and for insulation contractors and industrial employers, engaged in the building and construction industry, from which business it annually sells and ships products outside the State of Texas valued in excess of \$50,000.

Techalloy Company, Incorporated, herein called Techalloy, is a Pennsylvania corporation with principal offices in the State of Pennsylvania and branch offices in the State of Connecticut, New York, Illinois, California, Georgia and Texas, and is engaged at Houston, Texas, in conversion (redraw and reroll) of stainless steel and high nickel alloy, and in the sale and distribution of its products to insulation contractors, engaged in the building and construction industry, and to industrial employers, from which [fol. 189] business it annually sells and ships outside the State of Texas at in excess of \$50,000.

The building and construction industry is an "industry affecting commerce" within the meaning of Section 8(b) (4)(i) and (ii)(B) of the Act.

Houston Insulation, Armstrong, Johns-Manville, Thorpe, and Techalloy are, and have been at all times material herein, persons within the meaning of Section 2(1) of the Act, and employers engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act, respectively.

## II. Labor organization involved

Respondents are labor organizations within the meaning of Section 2(5) of the Act.



### III. The unfair labor practices

#### A. *The facts*

##### 1. Background

Thorpe Products Company, herein Thorpe, at times material herein, sold mitered fittings to Armstrong Contracting and Supply Company, herein Armstrong, which Armstrong used at its insulation construction job at Victoria, Texas. The project was the construction of an ammonia plant for E. I. duPont de Nemours & Company.

Techalloy Company, Incorporated, herein Techalloy, at times material herein, sold stainless steel bands to Johns-[fol. 190] Manville Sales Corporation, herein Johns-Manville, for pipe lines it was installing at an American Oil Company loading wharf at Texas City, Texas.

None of the Respondents is certified or recognized as the collective-bargaining representative of either Thorpe or Techalloy.

Both Johns-Manville and Armstrong are members of the Contractors Association, which had a collective-bargaining agreement with Local 22,\* and both were signatories to the agreement. The contract contained two articles cited by Respondents in support of its position in the case. These read as follows:

#### ARTICLE VI

The Employer agrees that he will not sublet or contract out any work described in Article XIII and the Union agrees not to contract, subcontract or estimate on work nor allow its membership to do so nor to act in any trade capacity other than that of workman. It is also agreed that no member of a firm or officer of a corporation or their representative or agents shall execute any part of the work

---

\* Marked as Charging Party's Exhibit No. 1, introduced by Respondents.

of application of materials and in no case shall any member of the Union estimate on or give any labor figures.

[fol. 191]

## ARTICLE XVI

The Agreement covers the rates of pay rules and working conditions of all Mechanics and Improvers engaged in the preparation, distribution and application of pipe and boiler coverings, insulation of hot surfaces, ducts, flues, etc., also the covering of cold piping and circular tanks connected with the same and all other work included in the trade jurisdictional claims of the Union.

This to include alterations and repairing of work similar to the above and the use of all materials for the purpose mentioned.

### 2. The refusal at Armstrong

Thorpe manufactured a number of products, among which were mitered fittings, the only product involved in the dispute. Some of these fittings were sold to Armstrong on August 2 and 6. The dispute however, had its genesis earlier.

C. E. Foster, branch manager for Armstrong and president of the Contractors Association, testified that he was in charge of the insulation work under general contractor Lummus Company at Victoria (the duPont project). Lynn Williams was superintendent and Robert Graham was foreman. In the latter part of June or early July Foster received a call from Graham, a member of Local 113, advising him that the members of Local 113 employed by Armstrong refused to supply mitered fittings received at the [fol. 192] jobsite because they did not have labels (decals).<sup>3</sup>

<sup>3</sup> These labels were gummed and could be affixed to insulation products and bore a number which identified the shop in which the product was made. They were distributed to the shops by the respondent locals so that only the products of union shops would bear the label. They were not the same as a union label but one result of their use was union identification.

In the latter part of July a meeting was held at the job-site attended by a Mr. DeQuir of Lummus, Foster, Williams and James Eaton, business agent of Local 113. Eaton was asked if his men would apply the fittings and Eaton asked, "Is that all we have to discuss, gentlemen?" The meeting then ended. After the meeting Eaton told Foster and Williams he could not permit them to apply the fittings. It does appear, however, from the testimony of Eaton, *infra*, that the fittings were later applied when Eaton received a letter from Armstrong<sup>4</sup> stating that the fittings had been made by Armstrong's Houston shop.<sup>5</sup>

[fol. 193] The mitered fittings manufactured by Thorpe and delivered in early August were not applied by Armstrong's workers until September 16 when a District Court injunction was obtained under the provisions of Section 10(1) of the Act. Lynn Williams testified that he was employed as construction superintendent by Armstrong at Victoria until August 17 when he left for New Orleans. Williams was on vacation when the Thorpe fittings were delivered but he testified that Graham told him that any member of Local 113 who applied the fittings (which bore no label) would be disciplined and that Eaton twice told him that the fittings would not be applied unless they had labels.

---

<sup>4</sup> Respondent Local's Exhibit No. 1.

<sup>5</sup> An explanation for what seems a confusion may be explained by the fact that a meeting was held on June 3 by the Contractors Association to which Brooks Baker, vice president of the International and Secretary of Local 22, and Joseph Shrode, business agent of Local 22 were invited. At this meeting Baker and Shrode presented the reasons why they wanted the label (identification) and the contractors stated their opposition. After the meeting the Contractors Association sent a letter to Local 22 stating it would not permit labelling in the shops of its members. About July 16 several members of the Association suffered work stoppages because the fittings delivered to jobs did not have the union labels. This stoppage at Armstrong was presumably one of them, for it was the fact that the fittings did not bear the label, not an allegation that they were nonunion products, which caused the refusal. The testimony on this issue is admittedly confusing.

Eaton testified that his attention was first directed to the fact that mitered fittings without labels had been delivered to the Victoria job by members of Local 113. Eaton, who claimed the right under articles VI and XI of his contract (article XI of Local 113's contract was identical with article XIII in Local 22's contract) to insist that the cutting of the fittings be done by employees of Armstrong. When Williams told him that Armstrong's employees had cut the [fol. 194] fittings Eaton asked for proof and, when he received the letter, *supra*, the fittings were applied.

### 3. The refusal at Johns-Manville

Edwin E. Roberts, contract manager for Johns-Manville at Houston, testified that over a period of years Techalloy supplied Johns-Manville with Stainless steel bands, stainless steel wire and wire ties, materials used in insulation contracting. In July, Johns-Manville purchased stainless steel bands from Techalloy which had been precut by Techalloy employees for use on an American Oil Company project at Texas City. The bands were delivered to the Johns-Manville Houston warehouse where an employee named Robert Oliver was to apply seals to the bands. Oliver told Roberts he could not apply the seals because Business Agent Shrode of Local 22 told him he (Oliver) could not apply the "union" label since the bands had been cut by employees who were not members of Local 22. The record does not disclose the sequence to this refusal.

Roberts further testified that H. Clifford David was foreman at the American Oil job and that in the latter part of July, David told him that he had been told by Shrode that he (David) could not apply the precut bands because they did not have a union label. Roberts then called Shrode who told him that the bands could not be applied because [fol. 195] they had not been cut by members of the As-

---

\* The labels, or decals, were frequently referred to as union labels since the use of the label would serve to indicate the product was fabricated in a union shop.



bestos Workers and that Oliver could not affix the seals for the same reason. (The bands were later affixed by members of the Sheetmetal Workers, following a change in contract specifications.)

H. Clifford David, foreman for Johns-Manville at American Oil, testified that on or about July 19 Shrode told him that he (Shrode) had heard that the bands which were to be used were precut and that if they came in without labels David was to refuse to apply them. On July 23 David went to Texas City to start the American Oil job, found the bands had no labels and went to Roberts and told him he could not use them. David testified that if bands were received with a label he called his business agent and gave him the label number; if bands bore no label he informed him of that.

Brooks Baker, called by Respondent International, testified that his Local (22) and Local 113 had instructed their members not to handle the products of Thorpe and Techalloy because the locals did not have contracts with Thorpe and Techalloy and the use of their products by members of the Contractors Association was in violation of Article VI and XIII of the agreement. Since Johns-Manville and Armstrong were signatories to the contract Baker considered their use of the fitting in the one case and the precut bands in the other to be a violation. In Baker's opinion it would be a violation of the contract whether the fabricator employed union members or not, since this was work (mitering and precutting) customarily performed by Johns-Manville and Armstrong employees. Baker cited an instance where prefabricated fittings were delivered to Industrial Insulators (a signatory to the contract) by a [fol. 196] supplier in Shreveport who had a contract with the Shreveport local and the members employed by Industrial Insulators were instructed not to use them. It was Baker's contention that the issue was not one of a union or nonunion product, but of the right of the employees of the Company which had the contract to perform the mitering and fitting.



Joseph Shrode admitted telling Oliver he could not seal the precut bands because they had not been cut at the Johns-Manville shop and telling David that if the bands arrived at Texas City without a label showing they had been cut by Johns-Manville he was not to apply them. Had the Techalloy bands been cut by Johns-Manville there would have been no objection even though the bands themselves were made in nonunion shop. Like Baker, Shrode contended that it was the loss of work customarily performed at Johns-Manville and not the fact that they were cut by nonunion men which engendered the boycott.

### *B. Conclusions*

There is little dispute on the facts in this case since Baker, Shrode and Eaton all admitted telling members of the respondent locals, employed by Armstrong and Johns-Manville, not to apply mitered fittings and precut bands at the jobsites involved. Plainly this constituted inducement and encouragement of individuals to refuse to handle goods and perform services and restraint and coercion of employers as those terms are used in the Act. Assuming that the objective was to retain for the employees of Arm-[fol. 197] strong and Johns-Manville work on fittings and bands' which, in at least two instances, was performed by Thorpe and Techalloy employees, the issue remains whether the means used to obtain such an objective were unlawful. In so assuming I concede that this was not a boycott of nonunion products and I also concede that the Articles VI and XIII of the agreement with the Contractors Association are lawful.\*

Having stated the case in a posture most favorable to the Respondents I still find the refusal to handle Thorpe

---

\* I also, agree, in view of Foster's testimony that the purchase of fittings from Thorpe were merely fill-ins, that the mitering of fittings was customarily performed by Armstrong employees at its Houston shop.

\* The contract was not attacked by the General Counsel.

and Techalloy products unlawful. Respondents urge that their contract gave them the right to this work, a contention with which I disagree for the exemption to Section 8(e) applies only to work to be done at the jobsite. Thus the House Conferees stated: (Leg. Hist., Vol. 1, p. 943).

It should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the construction. The proviso does not exempt from Section 8(e) agreements relating to supplies or other products or materials shipped or otherwise transported to and delivered on the site of the construction.

[fol. 198] The then Senator Kennedy stated: (105 Cong. Rec. 16415, Sept. 3, 1959, Legislative History, Vol. 2, p. 1433).

It should be particularly noted that the proviso relates only to the "contracting or subcontracting of work to be done at the site of the construction." The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite.

Respondents, then, were under a misapprehension if they believed the refusals were justifiable under their construction of their rights to protect their contract. The evidence here is clear that the mitring and cutting, even when performed by Armstrong and Johns-Manville employees, was performed at their shops and not at the jobsite.

Nor would Respondents have been helped if the work had been jobsite construction work for a refusal to handle goods for the purpose of enforcing such an agreement is unlawful under *Sand Door*.<sup>\*</sup> *Sand Door* was specifically stated in the legislative history to be controlling in construing the

<sup>\*</sup> Local 1976, *United Brotherhood of Carpenters v. N.L.R.B.*, 357 U.S. 93.

exemption proviso of Section 8(e). (Leg. Hist., Vol. 1, p. 943, *supra*; Leg. Hist., Vol. II, p. 1433, *supra*; Leg. Hist., Vol. II, p. 1829).<sup>10</sup>

[fol. 199] Nor am I impressed by the argument that this contract was, in effect, a contract against subcontracting work usually performed by a bargaining unit. This is not such a contract; this was clearly a contract aimed at the exemption of Section 8(e) and I believe this is admitted by Respondents in their brief. Just as the construction industry differs from production industry, so does the construction subcontracting clause differ from industry's subcontracting clauses and so does the exemption given the construction industry distinguish it from the general protection given industry. The court decision in *Retail Clerks Union 770 v. N.L.R.B.*, 48 LRRM 2598, and the Board's decision on remand, 145 NLRB No. 33, I find inapposite. However, there seems to be no point in belaboring this issue, the statements made in the Congressional debates, Legislative History, *supra*, indicate beyond argument that the Congress intended to proscribe the refusal to handle goods which took place here.<sup>11</sup>

I do not find, on the evidence submitted in this case, that Respondent International engaged in any violation or that it participated in the decisions to order the members of Local 22 and Local 113 to refuse to use the fittings and bands. While Baker was a vice president of the International it appears that in this case he was at all times acting in his capacity as secretary to Local 22. The dispute was [fol. 200] a local dispute and I have no evidence that the International directed it or intervened in it.

<sup>10</sup> This view has been adopted by the Board in *International Union of Operating Engineers, Local Union 12 (Tri-County Assn. of Civil Engineers and Land Surveyors)*, 126 NLRB 688, enforced, 293 F. 2d 319.

<sup>11</sup> The argument that Armstrong and Johns-Manville were the primary employers does not help Respondents for, as the Supreme Court held in *Sand Door*, when employees strike or refuse to handle goods for their employer to compel him to cease doing business with a third person the strike or refusal is unlawful.

### The Remedy

Having found that the Respondents have engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

Since the Board has found violations against another local of the International herein and against the International for conduct similar to that proscribed here and since the Respondents have claimed the right to take action found unlawful herein to protect their contract rights under the collective-bargaining agreement I shall recommend an order designed to prevent the commission of similar and related unfair labor practices which may reasonably be anticipated.

Upon the basis of the foregoing findings and conclusions and upon the entire record in this case, I make the following:

#### Conclusions of Law

1. Armstrong, Johns-Manville, Thorpe and Techalloy are employers engaged in commerce within the meaning of the Act.

Respondents are labor organizations within the meaning of Section 2(5) of the Act.

[fol. 201] 2. Respondent Local 113 has induced and encouraged individuals employed by Armstrong to refuse to handle or work on materials produced by Thorpe and have coerced and restrained Armstrong with an object of forcing or requiring Armstrong to cease doing business with Thorpe, and has thereby violated Section 8(b)(4)(i) and (ii)(B) of the Act.

3. Respondent Local 22 has induced and encouraged individuals employed by Johns-Manville to refuse to handle or work on materials produced by Techalloy with an object of forcing or requiring Johns-Manville to cease doing



business with Techalloy, and has thereby violated Section 8(b)(4)(i) and (ii)(B) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

5. Respondent International has not committed unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) and Section 2(6) and (7) of the Act.

### Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case it is recommended that Respondent Local 22 and Respondent Local 113, their officers, representatives, agents, successors and assigns, shall:

#### 1. Cease and desist from:

(a) Inducing or encouraging any individual employed by Armstrong, Johns-Manville, or by any other person [fol. 202] engaged in commerce or in an industry affecting commerce, to refuse to install or apply products or material manufactured or fabricated, for use in the insulation industry, by Thorpe, Techalloy, or by any other person.

(b) Threatening, coercing, or restraining Armstrong, Johns-Manville, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Armstrong, Johns-Manville, or such other persons, not to purchase, or install or apply products or material manufactured or fabricated, for use in the insulation industry, by Thorpe, Techalloy, or by any other person.

#### 2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post in conspicuous places in their respective business offices, meeting halls, and other places where they



customarily post notices to members, copies of the notice attached hereto as an Appendix,<sup>12</sup> furnished by the Regional Director for the Twenty-third Region, on first being [fol. 203] signed by the respective authorized representative of Respondents, for a period of 60 consecutive days on receipt thereof.

(eb) Furnish the Regional Director for the Twenty-third Region copies of said notice signed by the Respondents, as indicated, for posting by Armstrong, Johns-Manville, and the other Member Employers of Houston Insulation, if they should be willing, on their respective jobsites where notices are customarily posted.

(c) Notify the Regional Director for the Twenty-third Region in writing, within 20 days from the date of service of this Decision, as to the steps taken to comply herewith.<sup>13</sup>

Dated at Washington, D. C. February 3, 1964.

John F. Funke, Trial Examiner.

---

<sup>12</sup> If these Recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. If the Board's Order is enforced by a decree of the United States Court of Appeals, the notice will be further amended by the substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

<sup>13</sup> If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Twenty-third Region, in writing within 10 days from the date of this Order, what steps the Respondents have taken to comply herewith."

## APPENDIX A

NOTICE TO ALL MEMBERS  
PURSUANT TO  
THE RECOMMENDATIONS  
OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT induce or encourage any individual employed by ARMSTRONG CONTRACT AND SUPPLY CORPORATION, JOHNS-MANVILLE SALES CORPORATION, or by any other person engaged in commerce or in an industry affecting commerce, to refuse to install or apply products or material manufactured or fabricated, for use in the insulation industry, by THORPE PRODUCTS COMPANY, TECH-ALLOY COMPANY, INCORPORATED, or by any other person.

WE WILL NOT threaten, coerce, or restrain ARMSTRONG CONTRACTING AND SUPPLY CORPORATION, JOHNS-MANVILLE SALES CORPORATION, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require ARMSTRONG CONTRACTING AND SUPPLY CORPORATION, JOHNS-MANVILLE SALES CORPORATION, or such other persons, not to purchase, install or apply products or materials manufactured or fabricated, for use in the insulation industry, by THORPE PROD-  
[fol. 205] UCTS COMPANY, TECHALLOY COMPANY, INCORPORATED, or by any other person.

**LOCAL 22, INTERNATIONAL  
ASSOCIATION  
OF HEAT AND FROST  
INSULATORS AND  
ASBESTOS WORKERS, AFL-  
CIO  
(Labor Organization)**

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

**APPENDIX B**

**NOTICE TO ALL MEMBERS  
PURSUANT TO  
THE RECOMMENDATIONS  
OF A TRIAL EXAMINER**

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

**WE WILL NOT** induce or encourage any individual employed by **ARMSTRONG CONTRACTING AND SUPPLY CORPORATION, JOHNS-MANVILLE SALES CORPORATION**, or by any other person engaged in commerce or in an industry affecting commerce, to refuse to install or apply products or material manufactured or fabricated, for use in the insulation industry, by **THORPE PRODUCTS COMPANY**, [fol. 206] **PANY, TECHALLOY COMPANY, INCORPORATED**, or by any other person.

**WE WILL NOT** threaten, coerce, or restrain **ARMSTRONG CONTRACTING AND SUPPLY CORPORATION, JOHNS-MANVILLE SALES CORPORATION**, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require **ARMSTRONG CON-**

TRACTING SUPPLY CORPORATION, JOHNS-MANVILLE SALES CORPORATION, or such other persons, not to purchase, install or apply products or material manufactured or fabricated, for use in the installation industry, by THORPE PRODUCTS COMPANY, TECHALLOY COMPANY, INCORPORATED, or by any other person.

LOCAL 113  
INTERNATIONAL  
ASSOCIATION OF HEAT AND  
FROST INSULATORS AND  
ASBESTOS WORKERS, AFL-  
CIO  
(Labor Organization)

Dated ..... By .....  
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 6617 Federal Office Building, 515 Rusk [fol. 207] Avenue, Houston, Texas 77002 (Tel. No. Capitol 8-0611, Ext. 271), if they have any question concerning this notice or compliance with its provisions.

#### BEFORE THE NATIONAL LABOR RELATIONS BOARD

#### EXCEPTIONS OF HOUSTON INSULATION CONTRACTORS ASSOCIATION, CHARGING PARTY, TO TRIAL EXAMINER'S RECOMMENDED DECISION

Comes now Houston Insulation Contractors Association, the Charging Party herein, hereafter referred to as "the Association", and files these, its Exceptions to the Trial Examiner's Decision and to his rulings on the evidence and formal offers of proof and says:

## 1.

The Association excepts to the findings on page 41, lines 5 through 9, and footnote 8, being a part thereof, of the Trial Examiner's Decision, for the reason that Article VI and XIII of the Agreement are, as a matter of law, unlawful in that they violate the provisions of Section 8(b)(4)(i) and (ii) and Section 8(e) of the National Labor Relations Act as amended, and such finding is contrary to the only substantial evidence in the case and contrary to law.

[fol. 208]

## 2.

The Association excepts to the finding at lines 21 through 27 of page 43 and lines 1-3 of page 44 of the Trial Examiner's Decision for the reason that it is contrary to law and contrary to the only substantial evidence.

## 3.

The Association excepts to the conclusions as set out at lines 20 through 22 of page 45 of the Trial Examiner's Decision in that the conclusion is contrary to law and contrary to the only substantial evidence of record.

## 4.

The Association excepts to the recommendations of the Trial Examiner's Decision and to Appendixes "A" and "B" for the reason that they do not apply to the International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, and are, therefore, contrary to the only substantial evidence of record and contrary to law.

## 5.

The Association excepts to the rulings on the admissibility of evidence by the Trial Examiner at line 2 of page 73 through line 23 of page 75 of the transcript of testimony and upon the refusal of the Trial Examiner to permit the evidence to be shown as presented by the Association in the formal offer of proof at lines 24 of page 75 through



line 17 of page 76 of the transcript of testimony. In support thereof the Association says that such evidence was [fol. 209] erroneously excluded and that it is material to the issues and particularly to the issues set forth in Exceptions 1, 2, 3, and 4 above and that such evidence is substantial and would prove beyond a reasonable doubt that the International Union was guilty of the unfair labor practices as charged in the Complaint and that if the Trial Examiner had received and considered such testimony and formal offer of proof, he would have so found and he, therefore, erred in not considering such testimony and not receiving the testimony so offered.

## 6.

The Association further excepts to the Decision and says that the Trial Examiner erred in failing to find that the International Union was guilty of the unfair labor practices as charged in the Complaint and in failing to consider General Counsel's Exhibit 2 and the testimony of the witness Claude E. Foster appearing at lines 24 and 25 of page 62; lines 8 and 9 of page 63; lines 21 through 25 of page 63, line 1 through 25 of page 64; lines 1 through 15 of page 65; lines 22 through 25 of page 74; lines 1 through 15 of page 75, together with the formal offer of proof appearing at lines 23 through 25 of page 75 and lines 1 through 13 of page 76 of the transcript of testimony, together with the testimony of the witness Lynn Williams appearing at lines 13 through 16 of page 120 of the transcript of testimony in support thereof, all of which testimony would show beyond a reasonable doubt that the International Union is guilty of the unfair labor practices as charged in the Complaint.

[fol. 210]

## 7.

The Association further excepts to the ruling on the evidence and says that the Trial Examiner erred in rejecting the offer of proof made by Counsel for the General Counsel appearing at lines 19 through 25 of page 203

and lines 1 through 24 of page 204 of the transcript of testimony and the testimony of Mr. Brooks Baker, the International Representative of the Union, given in the United States District Court at Houston, Texas, in a companion case, all of which was offered by the General Counsel in his formal offer of proof as aforesaid, for the purpose of establishing that the International Union is guilty of unfair labor practices as charged and violated the Act as charged and for the purpose of impeaching the witness Brooks Baker, who was the International Representative of the Union.

## 8.

The Trial Examiner erred in refusing to receive and consider evidence relating to representations made by the Union prior to executing the contract between the Association and the Union as shown at line 7 of page 71 through line 14 of page 73 of the transcript of testimony to show that the Union took an inconsistent position with reference to the meaning and intent of Articles VI and XIII of the contract than it did at the time of the hearing. The matter had been placed in issue by the answer of the Local Unions and the statement of the International Union at lines 1 through 25 of page 14 and lines 1 through 13 of page 15 of the transcript of testimony and the Association was entitled to be heard upon the matter and when such testimony was offered.

Wherefore, the Association prays that upon consideration of the Exceptions to the Decision of the Trial Examiner and his rulings on the evidence, that the Board will reverse the Decision and find that the International Union is guilty of the violations of the provisions of the Act as charged.

Respectfully submitted,

W. D. Deakins, Jr., Attorney for Houston Insulation Contractors Association.

Of Counsel: Vinson, Elkins, Weems & Searls, 2100 First City National Bank Building, Houston, Texas 77002.

## BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE TRIAL  
EXAMINER'S DECISION—March 25, 1964

Comes Now the General Counsel, by the undersigned Counsel for the General Counsel, and hereby files the following cross-examinations to the Trial Examiner's Decision in the above-styled and numbered case.

[fol. 212] The General Counsel excepts to:

1. The conclusion that Respondents were not engaged in a boycott of nonunion products. (TXD 41, Lines 5-7)

2. The failure to find, on the evidence submitted, that Respondent International engaged in a violation of the Act, or that Respondent International participated in the decisions to order members of Respondent Local 22 and Respondent Local 113 to refuse to apply or install the pre-cut stainless steel bands and the mitered fittings. (TXD 43, Lines 21-25)

3. The conclusion, "While Baker was a vice president of the International it appears that in this case he was at all times acting in his capacity as secretary to Local 22." (TXD 43, Lines 25-27; TXD 44, Line 1)

4. The conclusion that the dispute was a "local dispute," without any evidence that Respondent International "directed it or intervened in it." (TXD 44, Lines 1-3)

5. The conclusion of law:

"Respondent International has not committed unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii) (B) and Section 2(6) and (7) of the Act." (TXD 45, Lines 20-22)

Upon the foregoing, together with the Brief of Counsel for the General Counsel in support thereof, the Memorandum of the General Counsel to the Trial Examiner submitted in conjunction herewith, and on the record herein

[fol. 213] considered as a whole, it is submitted that the foregoing cross-exceptions to the Trial Examiner's Decision should be allowed, findings of fact and conclusions of law made, and an order entered in accordance herewith together with appropriate remedial notices.

Respectfully submitted,

Arthur Safos, Counsel for the General Counsel, National Labor Relations Board.

Dated at Houston, Texas this 25th day of March, 1964.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

D-6370

148 NLRB No. 86

Houston, Texas

DECISION AND ORDER—September 4, 1964

On February 3, 1964, Trial Examiner John F. Funke issued his Decision in the above-entitled proceeding, finding that Respondent Locals 22 and 113 had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the Trial Examiner's Decision attached hereto. He also found that Respondent International had not engaged in any unfair labor practices and recommended that the complaint be dismissed as to it. Thereafter, Respondent Locals 22 and 113 and the Association, the Charging Party, filed exceptions [fol. 214] to the Trial Examiner's Decision and supporting briefs; cross-exceptions and a supporting brief were filed by the General Counsel; and answering briefs were filed by Respondent International and the Association.

The Board<sup>1</sup> has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial

<sup>1</sup> Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case.<sup>2</sup> The Board adopts the findings of fact made by the Trial Examiner to the extent consistent herewith and concludes that the complaint should be dismissed in its entirety.

We do not agree with the Trial Examiner that Respondent Locals 22 and 113 violated Section 8(b)(4)(i) and (ii)(B) of the Act. While Locals 22 and 113 may have caused a strike among employees of Johns-Manville and Armstrong, respectively, we conclude that such conduct constituted protected primary activity and was not for an object proscribed by the foregoing section of the Act.

[fol. 215] Johns-Manville, herein called JM, and Armstrong are engaged in the sale and installation of industrial insulation products. They are members of Houston Insulation Contractors Association, herein called the Association, which has a collective-bargaining contract with Local 22. The contract prohibits JM, Armstrong, and other employer-members from subcontracting certain work performed by their respective employees. This contract also has a provision in which the Employer agrees, when performing work outside Local 22's geographical jurisdiction, to adopt the existing rules and conditions of employment within the jurisdiction of a sister local which have been established by collective-bargaining agreements with insulation companies in that area.<sup>3</sup> As hereinafter discussed,

---

<sup>2</sup> The request of Respondent Locals 22 and 113 for oral argument before the Board is hereby denied, as the record, exceptions, and briefs adequately present the issues and positions of the parties.

<sup>3</sup> Article I of Local 22's contract provides:

The Employer further agrees that on all operations outside the chartered territory of the Union he will abide by the rates of pay, rules and working conditions established by collective-bargaining agreement between the Local insulation contractors and the local union in that territory. . . .



the work stoppage involving Armstrong's employees occurred in Victoria, Texas, within the jurisdiction of Local 113. Local 113's contract with employers in its jurisdiction contains an absolute ban against subcontracting similar to one contained in Local 22's contract.

Techalloy Company, Incorporated, herein called Techalloy, sells metal fastening products to JM and other insulation contractors. Some of the products are coils or rolls of stainless steel from which bands or strips may be cut and then used to fasten asbestos material around pipes which [fol. 216] are to be insulated. In one instance, Techalloy sold precut steel bands to JM which the latter purchased for use on an American Oil Co. project located at Texas City, Texas; which is within the geographical jurisdiction of Local 22. Generally, JM only purchases rolls or coils of steel from Techalloy and JM's employees then cut strips or bands from the roll. Techalloy's employees are not represented by any union.

Thorpe Products Company, herein called Thorpe, sells asbestos products to Armstrong and other insulation contractors. Some of these products are straight lengths of asbestos which may be cut to size and then used to cover pipes which are to be insulated. On one occasion, Thorpe sold mitered asbestos fittings to Armstrong which the latter purchased for use on a Dupont project located in Victoria, Texas, which is within the jurisdiction of Local 113. Generally, Armstrong only purchases straight length of asbestos from Thorpe, and Armstrong's employees then miter or cut the asbestos at angles with a saw and glue these cut sections together so that the material can be used to cover curved or "L" shaped pipes. This processing results in a mitered fitting.\* Thorpe's employees are non-union.

---

\* Premolded fittings, which are not involved in the instant case, but are hereinafter discussed in connection with other cases decided by the Board, are factory or machine manufactured with the use of heat and forms to produce "L" shaped insulation coverings. Neither Techalloy nor Thorpe manufacture premolded fittings.

[fol. 217] The General Counsel contends that Local 22 had a primary dispute with Techalloy because the latter employed nonunion employees and, in furtherance of that dispute, struck neutral employer JM to force it to cease doing business with Techalloy. With respect to Local 113's conduct, the General Counsel's position is the same; that Thorpe was the primary employer whose nonunion products were sold to neutral employer Armstrong. The Unions maintain that they were engaging in primary conduct against JM and Armstrong (Local 22 against JM and Local 113 against Armstrong), in protest of the subcontracting of work customarily performed by JM and Armstrong employees. The evidence relating to the work stoppages which we deem critical is summarized below.

The JM dispute: JM had always purchased coils or rolls of steel from Techalloy which JM's employees would cut into bands or strips to be used in applying insulation materials. This preparatory work was reserved for JM employees, and they could not be deprived of it by subcontracting, under Local 22's contract with JM. In July 1963, however, JM, for the first time purchased precut bands from Techalloy for use at the Texas City project. As the preparation work usually performed by JM employees was thus denied them, JM employees refused to apply these precut bands. JM's use of Techalloy products had never before been protested by Local 22.

The Armstrong dispute: Armstrong had always purchased straight lengths of asbestos materials from Thorpe which Armstrong's employees would cut to make mitered fittings which were then applied at the jobsite. The preparation work of making mitered fittings was reserved for [fol. 218] Armstrong employees under that employer's collective-bargaining contract with Local 22, and could not be subcontracted under Local 113's contract with employers in its geographical jurisdiction, which included Victoria, Texas, where the Armstrong dispute arose. As noted, Armstrong had in substance agreed to abide by Local 113's contractual ban against subcontracting.

In June or July 1963, a supply of mitered fittings were brought to the Victoria project which Armstrong's employees, who were members of Local 113, refused to apply until advised by Armstrong that its own employees in Houston, within Local 22's jurisdiction, had performed the preparation work. In August 1963, Armstrong's employees again refused to apply precut or mitered fittings at Victoria. These particular fittings had been purchased for the first time by Armstrong from Thorpe. Local 113 had never before protested the use of Thorpe products.

Upon the entire record, we cannot agree with the General Counsel that the Respondent Locals were engaged in a boycott of nonunion products in violation of the Act.\* While Techalloy and Thorpe were nonunion employers, neither Local 22 nor Local 113 had ever refused to apply their products before the incidents in question. On these occasions, the purchases made from them clearly deprived the JM and Armstrong employees of preparation work to which they were entitled. The conduct complained of herein [fol. 219] was taken to protest such a deprivation of work, its object being to protect or preserve for employees certain work customarily performed by them.\* This conduct constituted primary activity and is protected by the Act, as was the earlier action taken at the Victoria project to

---

\* In his disposition of the case, which we do not adopt, the Trial Examiner assumed that there was no such boycott.

\* In *International Association of Heat and Frost Insulators (Insul-Coustic Corporation), et al.*, 139 NLRB 659. *International Association of Heat and Frost Insulators (Speed-Line Manufacturing Company, Inc.), et al.*, 139 NLRB 688, upon which the General Counsel relies, the present situation did not obtain. In those cases, the premolded fittings boycotted by the unions had never been processed or prepared by the employees there involved.

. Although there is evidence that employees of JM refused to apply the precut steel bands and that employees of Armstrong refused to apply the mitered fittings because these products did not bear a union decal, the record shows that these decals were used to assist the unions to police the no-subcontracting contractual provisions.

protest the use of mitered fittings which, it was thought, [fol. 220] had been prepared by other than Armstrong's employees.<sup>7</sup>

[fol. 221] In view of our conclusion that Respondent Locals 22 and 113 did not violate the Act, the complaint must also be dismissed as to Respondent International. Accordingly, we shall dismiss the complaint in its entirety.

<sup>7</sup> In his separate opinion, Member Leedom disagrees with our finding that Local 113's conduct was lawful. He asserts that Local 113 had no collective-bargaining contract with Armstrong, and that the mitering which it was seeking to preserve would not in any event have been performed by employees whom it represented. But Armstrong had agreed with Local 22 that, when it performed work outside the territorial jurisdiction of Local 22, it would abide by terms and conditions of employment established in that area by contract between the local insulation contractors and the local union. Local 113's contract with insulation contractors contained the identical no-subcontracting clause present in Local 22's contract. It appears to be conceded that the clause was lawful.

Whether Local 113 is regarded as a third-party beneficiary of Local 22's bargaining contract or as agent of Local 22, it had the right to insist, in accordance with the terms of the contract, that Armstrong adhere to the lawful no-subcontracting clause. *Painters District Council No. 1 (Central States Painting and Decorating Company)*, 147 NLRB No. 12 (Members Leedom and Jenkins dissenting). On two occasions, Local 113 members who were employees of Armstrong refused to apply the mitered fittings. The first time, in June or July 1963, the employees voluntarily did apply them when informed that Armstrong employees at Houston had done the preparatory work. This incident has no significance because Armstrong had not subcontracted out the mitering and, therefore, had not violated the no-subcontracting clause. On the second occasion, in August 1963, Armstrong purchased the mitered fittings from Thorpe. Armstrong's employees refused to apply them at the direction of Local 113 because the work of mitering had been subcontracted out to another employer — Thorpe. Armstrong had thus violated the no-subcontracting clause of its contract and Local 113's conduct was therefore lawful. See *Milk Wagon Drivers and Dairy Employees Union, Local 603 (Drive-Thru Dairy, Inc.)*, 145 NLRB No. 42; *Ohio Valley District Council, United Brotherhood of Carpenters (Cardinal Industries, Inc.)*, 136 NLRB 977, 985-986.



[fol. 222]

ORDER

It Is Hereby Ordered that the complaint issued in this case be, and it hereby is, dismissed in its entirety.

Dated, Washington, D. C. September 4, 1964.

Frank W. McCulloch, Chairman, Gerald A. Brown,  
Member, National Labor Relations Board.

MEMBER LEEDOM, concurring and dissenting:

I agree with my colleagues' dismissal of the complaint as to Respondents International and Local 22, but not with their dismissal as to Respondent Local 113. As to Local 22, the record in my opinion fails to establish that this Respondent's conduct was directed at anything other than the enforcement of a lawful work-preservation clause in the agreement between it and Johns-Manville as an As-[fol. 223] sociation member.<sup>8</sup> Local 113's conduct, however, stands on a different footing.

Local 113 had no contract with Armstrong. It was neither a third-party beneficiary of Local 22's bargaining contract with Armstrong, nor is there anything to show that it was acting as an agent of Local 22 for the purpose of enforcing Local 22's contract with Armstrong. Nor can I agree with my colleagues' apparent position that Armstrong's contract with Local 22, through the Houston Association, would permit Local 113 to enforce against Armstrong the work-preservation clause in its agreement with a different employer association of which Armstrong was not a member.<sup>9</sup>

---

<sup>8</sup> As the alleged violation by the International necessarily hinges, in my opinion, on the alleged violation by Local 22, I concur in the dismissal as to the International but not in the Trial Examiner's stated reason for not imputing Baker's conduct to the International. Cf. *Catalina Island Sightseeing Lines*, 124 NLRB 813, at 816.

<sup>9</sup> See the dissenting opinion in *Central States Painting and Decorating Company*, 147 NLRB No. 12.



Farther, it is clear from the record that the mitering work which Local 113 was seeking to "preserve" would not in any event have been performed by employees which it represented, but would, if performed by Armstrong, have been performed by employees in another unit represented by Local 22; hence my colleagues are exculpating Local 113 for assertedly seeking to enforce an agreement to which it was not a party for the benefit of employees it did not represent.<sup>10</sup>

[fol. 224] In view of the absence of any valid contractual support for Local 113's asserted claim, and the further fact of Local 113's earlier willingness to permit employees represented by Local 22 to perform the very work which it refused to permit the unrepresented Thorpe employees to perform, I can only conclude that the record with respect to Local 113, unlike the record with respect to Local 22, establishes that *this* Respondent's objection to premitered fittings was based on the non-union status of the employees who had performed the work, and not on their non-unit status. As a refusal to install products for such union-related reasons is proscribed by Section 8(b)(4)(i) and (ii)(B), and as Local 113 is clearly responsible for such refusal, I would find that Respondent Local 113 violated the Act as alleged.<sup>11</sup> As my colleagues are unjustifiably dismissing the complaint as to this Respondent, I must to that extent dissent.

Dated, Washington, D. C. September 4, 1964,

Boyd Leedom, Member, National Labor Relations Board.

<sup>10</sup> See *R. O. Lewis, et al. (National Bituminous Coal Wage Agreement)*, 148 NLRB No. 31, in which the Board has only recently held a work protection clause invalid under Section 8(e) "where, as here, the work protection sought extends beyond the established unit."

<sup>11</sup> See *R. O. Lewis, et al., supra*.

[fol. 225] [File endorsement omitted]

[fol. 226]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21910

HOUSTON INSULATION CONTRACTORS ASSOCIATION, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

and

LOCAL 22, INTERNATIONAL ASSOCIATION OF HEAT AND FROST  
INSULATORS AND ASBESTOS WORKERS,

and

LOCAL 113, INTERNATIONAL ASSOCIATION OF HEAT AND FROST  
INSULATORS AND ASBESTOS WORKERS,

and

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS,  
AFL-CIO, Respondents.

PETITION FOR REVIEW AND TO SET ASIDE A DECISION AND  
ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND  
APPENDIX—Filed September 17, 1964

To the United States Court of Appeals for the Fifth Circuit  
and the Honorable Judges Thereof:

Comes now Houston Insulation Contractors Association,  
hereinafter called "Petitioner," and files this Petition for  
[fol. 227] Review and to Set Aside the Decision and Order  
of the National Labor Relations Board, hereinafter called  
the "Board," issued September 4, 1964,<sup>1</sup> by which Petitioner  
is aggrieved as hereinafter set forth.

<sup>1</sup> 148 NLRB No. 86.

### The Parties

Petitioner is an unincorporated association of contractors who engage in the business of the sale and application of thermal insulation materials to commercial owners and in industry in Houston and Victoria and at other localities within the State of Texas, with its principal place of business at 11th and Maxroy Streets, Houston, Texas.

Respondent is a public body designated and known as the National Labor Relations Board provided for by the provisions of the Labor Management Relations Act (29 USC §153), composed of the following members: Frank W. McCulloch, Gerald A. Brown, Boyd Leedom, Howard Jenkins, Jr., and John H. Fanning. Respondent maintains its principal office at 1717 Pennsylvania Avenue, N.W., [fol. 228] Washington 25, D. C.; International Association of Heat and Frost Insulators, AFL-CIO, is a union located at 1300 Connecticut Avenue, Washington 6, D. C.; Local 22 is located at 4717 Gulf Freeway, Houston, Texas; and Local 113 is located at 350 Omaha, Corpus Christi, Texas.

### Jurisdiction and Venue

This Court has jurisdiction of this Petition for Review under the provisions of Section 10(f) of the Labor Management Relations Act, as amended, 29 USC §160(f).

Petitioner is located and has its principal place of business within the Fifth Judicial Circuit of the United States and within the jurisdiction of this Honorable Court.

Petitioner is a party to the proceedings herein complained of and was the charging party, having filed the charges out of which the Complaint issued herein and out of which the Decision and Order complained about was issued by the Respondent, and Petitioner is aggrieved by such Decision and Order, as will be more fully set forth hereafter.

## Statement of the Proceedings

By the Decision and Order issued September 4, 1964, Respondent found that Local 22, International Association of Heat and Frost Insulators and Asbestos Workers, hereinafter called "Local 22"; Local 113, International [fol. 229] Association of Heat and Frost Insulators and Asbestos Workers, hereinafter called "Local 113"; and the International Association of Heat and Frost Insulators, AFL-CIO, hereinafter called the "International," were not in violation of the provisions of Section 8(b)(4)(i) and (ii)(B) of the Act<sup>2</sup> and dismissed the Complaint in its entirety.

The Decision and Order were issued following proceedings instituted by a charge filed by Petitioner on August 8, 1963, alleging that Locals 22 and 113 and the International had violated the provisions of Section 8(b)(4)(i) and (ii)(B) of the Act in refusing to handle the products of Thorpe Products Company and Techalloy Company, Incorporated, who had sold products of their manufacture to Johns-Manville Sales Corporation and Armstrong Contracting and Supply Corporation, respectively, for application on contracts being performed by Johns-Manville at Texas City, Texas, and Armstrong at Victoria, Texas.

[fol. 230] After investigation of such charges, the General Counsel issued a Complaint on September 5, 1963, charging violation of the provisions of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended, by Locals 22 and 113 and the International.

An injunction was secured by the General Counsel on September 13, 1963, before the Hon. Joe Ingraham, in the United States District Court at Houston, Texas, restraining Locals 22 and 113, the International, their officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them from conducting secondary boycotts and from violation of the provisions of Section 8(b)(4)(i) and

---

<sup>2</sup> 29 USC §158.

(ii)(B) of the Act. A copy of such injunction is a part of the Appendix hereof.

After a hearing was held, Trial Examiner John F. Funke issued his Decision finding Locals 22 and 113 had engaged in and were engaging in unfair labor practices as charged and recommended that they cease and desist therefrom. The Trial Examiner found that the International had not engaged in unfair labor practices and recommended that the Complaint be dismissed as to it.

[fol. 231] Thereafter, Locals 22 and 113 and the Petitioner here filed exceptions to the Trial Examiner's Decision and the General Counsel filed cross exceptions to the exceptions filed by Locals 22 and 113.

The Respondent, sitting by a three-member panel, issued its Decision and Order complained of here, adopting the findings of fact made by the Trial Examiner " \* \* \* to the extent consistent (therewith) and (concluded) that the complaint should be dismissed in its entirety." The Respondent also " \* \* \* reviewed the rulings of the Trial Examiner made at the hearing and (found) that no prejudicial error was committed."

Petitioner is aggrieved by Respondent's Decision and Order issued September 4, 1964, and errors of the Trial Examiner as pointed out by Exceptions duly filed with the Respondent to the Trial Examiner's Decision. Copies of the Decision and Order of the Board and the Trial Examiner's Decision are set out in full in the Appendix hereof.

### Assignments of Error

Petitioner relies upon the following assignments of error in the Decision and Order of September 4, 1964, and errors [fol. 232] of the Trial Examiner duly urged before the Respondent in Exceptions filed to the Trial Examiner's Decision for reversal of the Decision and Order of the Respondent:

- (1) Respondent erred in finding that Locals 22 and 113 had not violated Section 8(b)(4)(i) and (ii)(B) of the Act.



- (2) Respondent erred in finding that the strike or refusal to handle the products of Techalloy Company, Incorporated, and Thorpe Products Company were protected primary activity against Johns-Manville Sales Corporation and Armstrong Contracting and Supply Corporation.
- (3) Respondent erred in failing to find that the refusal to handle the products of Techalloy Company, Incorporated, and Thorpe Products Company was for an unlawful object of boycotting non-union goods and thus violated Section 8(b)(4)(i) and (ii)(B) of the Act.
- (4) Respondent erred in failing to reverse the Decision of the Trial Examiner insofar as he found that the [fol. 233] International had not violated the provisions of the Act and in failing to find that the International Association of Heat and Frost Insulators violated the provisions of Section 8(b)(4)(i) and (ii)(B) of the Act as the moving force which directed the unlawful activities of Locals 22 and 113.
- (5) Respondent erred in failing to reverse the ruling of the Trial Examiner who refused to receive evidence that Locals 22 and 113 and the International were guilty of a preconceived unlawful course of conduct and conspiracy to violate the provisions of Section 8(b)(4)(i) and (ii)(B) of the Act.
- (6) Respondent erred in failing to reverse the ruling of the Trial Examiner excluding evidence which would have shown that the contract between the parties was stipulated and agreed to cover only work to be performed at the job site and to prevent the contractors from contracting such work to non-union contractors.
- (7) Respondent erred in reversing the Trial Examiner's finding as to the refusal of Locals 22 and 113 to handle the products of Techalloy Company, Incorporated, [fol. 234] and Thorpe Products Company and holding

that such refusal to handle was a protestation for the deprivation by Johns-Manville Sales Corporation and Armstrong Contracting and Supply Corporation of work customarily performed by members of Locals 22 and 113 in that such finding is:

(a) Contradictory of Respondent's findings that the products of Techalloy Company, Incorporated, and Thorpe Products Company had been handled in the past by members of Locals 22 and 113 without protest, and

(b) Contrary to the substantial evidence which showed the object of the unlawful acts of the members of Locals 22 and 113 were to boycott the goods and products of non-union contractors.

(8) The Respondent erred in failing to find that the provisions of Section 8(e) of the Act limits the applicability of the agreement not to subcontract work to be performed at the job site and not to work performed by Techalloy Company, Incorporated, and Thorpe Products Company which was performed off the job site.

[fol. 235] (9) The Respondent erred in making findings not based on substantial evidence.

(10) Alternatively, Respondent erred in failing to find that picketing to enforce the provisions of the contract between the Houston Insulation Contractors Association and Locals 22 and 113 was proscribed by the Act.

(11) Respondent erred in finding that in June or July, 1963, the employees of Armstrong Contracting and Supply Corporation voluntarily applied mitred fittings when informed that employees of Armstrong at Houston had done the preparatory work, as contrary to the evidence.

- (12) Respondent erred in finding that the purchase of materials from Thorpe Products Company and Tech-alloy Company, Incorporated, by Johns-Manville Sales Corporation and Armstrong Contracting and Supply Corporation deprived the members of Locals 22 and 113 of preparation of work to which they are entitled, contrary to the only substantial evidence.
- (13) Respondent erred in finding that under the contracts between the Houston Insulation Contractors Association and Locals 22 and 113, the work in dispute could [fol. 236] not be contracted and was preserved for such employees, contrary to the substantial evidence.

### Prayer

Wherefore, Petitioner respectfully prays:

(1) That a copy of this Petition be forthwith transmitted by the Clerk to the National Labor Relations Board at 1717 Pennsylvania Avenue, N.W., Washington, D. C.

(2) That this Court, upon review of this case, vacate and set aside Respondent's Decision and Order issued September 4, 1964.

(3) That this Court order and direct Respondent enter an order that Locals 22 and 113 and the International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, their officers, representatives, agents, successors and assigns shall cease and desist from:

(a) Inducing or encouraging any individual employed by Johns-Manville Sales Corporation and Armstrong Contracting and Supply Corporation or by any other person engaged in commerce or in an industry affecting commerce, where the object thereof is in force or require Johns-Manville Sales Corporation or [fol. 237] Armstrong Contracting and Supply Corporation, or such other persons, not to purchase, or install or apply any products or material manufactured or

fabricated, for use in the insulation industry by Thorpe Products Company or Techalloy Company, Incorporated, or by any other person.

(b) Threatening, coercing or restraining Armstrong Contracting and Supply Corporation or Johns-Manville Sales Corporation, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Armstrong Contracting and Supply Corporation or Johns-Manville Sales Corporation, or such other persons, not to purchase, or install or apply products or material manufactured or fabricated, for use in the insulation industry, by Thorpe Products Company or Techalloy Company, Incorporated, or by any other person.

(c) Alternatively, and if this Honorable Court does not issue the Order prayed for above, to order the Respondent to re-open the proceedings for the purpose [fol. 238] of receiving the evidence rejected by the Trial Examiner as set out in Assignments of Error (5) and (6) above.

Respectfully Submitted,

W. D. Deakins, Jr., Attorney for the Houston Insulation Contractors Association.

Of Counsel: Vinson, Elkins, Weems & Searls, 2100 First City National Bank Bldg., Houston, Texas 77002.

September 14, 1964.

[fol. 239] Certificate of Service (omitted in printing).

[fol. 241]

APPENDIX TO PETITION

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

Civil No. 63-H-452

CLIFFORD W. POTTER, Regional Director of the Twenty-third  
Region of the National Labor Relations Board, for and  
on behalf of the National Labor Relations Board, Peti-  
tioner,

v.

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS  
AND ASBESTOS WORKERS, AFL-CIO,

and

LOCAL 22, INTERNATIONAL ASSOCIATION OF HEAT AND FROST  
INSULATORS AND ASBESTOS WORKERS, AFL-CIO,

and

LOCAL 113, INTERNATIONAL ASSOCIATION OF HEAT AND FROST  
INSULATORS AND ASBESTOS WORKERS, AFL-CIO, Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—  
September 13, 1963

This cause came on to be heard upon the verified peti-  
tion of Clifford W. Potter, Regional Director of the Twenty-  
third Region of the National Labor Relations Board (herein  
called the Board), for a temporary injunction pursuant to  
[fol. 242] Section 10 (1) of the National Labor Relations  
Act, as amended (herein called the Act), pending the final  
disposition of the matters involved herein pending before  
the Board, and upon the issuance of an order to show



cause why injunctive relief should not be granted as prayed in said petition. Respondents filed an answer to said petition. A hearing on the issues raised by the petition and answer was duly held on September 6 and 12, 1963. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to present evidence bearing on the issue, and to argue on the evidence and the law. The Court has fully considered the petition, answers, evidence, arguments, and briefs of counsel. Upon the entire record, the Court makes the following:

### Findings of Fact

1. Petitioner is Regional Director of the Twenty-third Region of the Board, an agency of the United States, and filed the petition herein for and on behalf of the Board.

2. On or about August 8, 1963, Houston Insulation Contractors Association (herein called Houston Insulation), pursuant to provisions of the Act, filed a charge with the Board alleging, *inter alia*, that International Association [fol. 243] of Heat and Frost Insulators and Asbestos Workers, AFL-CIO; Local 22, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO; and Local 113, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO (herein called Respondents), labor organizations, have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii), subparagraph (B), of the Act.

3. The aforesaid charge was referred to petitioner as Regional Director of the Twenty-third Region of the Board.

4. There is, and petitioner has, reasonable cause to believe that:

(a) Respondents, unincorporated associations, are organizations in which employees participate and which exists for the purpose, in whole or in part, of dealing with em-

employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(b) Respondents International, Local 22 and Local 113 maintain their principal offices at Washington, D. C., Houston, Texas and Corpus Christi, Texas, respectively, and at all times material herein all of Respondents have been engaged within this judicial district in transacting business [fol. 244] and in promoting and protecting the interests of their respective employee members and the employee members of constituent and affiliated labor organizations.

(c) Houston Insulation, a Texas corporation, with its principal office and place of business at Houston, Texas, is an Association of employers engaged generally in the sale, distribution and installation of insulation products to and for employers engaged in interstate commerce and in the building and construction industry principally at Houston, Galveston, Beaumont, and Port Arthur, Texas, and exists for the purpose, *inter alia*, of negotiating and administering collective bargaining agreements with Respondent Local 22 made for and on behalf of its Member Employers, who in the course and conduct of their business operations annually sell, distribute and install insulation products to and for employers engaged in interstate commerce and in the building and construction industry in an amount in the aggregate valued at in excess of \$10,000,000.

(d) Armstrong Contracting and Supply Corporation (herein called Armstrong), a Member Employer of Houston Insulation, and a subsidiary of Armstrong Cork Company with principal offices at Lancaster, Pennsylvania, is a Delaware [fol. 245] corporation, and is engaged at Houston, Texas, in the sale and installation of industrial insulation products, pursuant to contract, in the building and construction industry, from which business it annually sells and ships products outside the State of Texas valued at in excess of \$50,000.

(e) Johns-Manville Sales Corporation (herein called Johns-Manville), a Member Employer of Houston Insulation, is a Delaware corporation with principal offices in the State of New York and branch offices in several States including the State of Texas, and is engaged at Houston, Texas, in the manufacture and sale of insulation material, pursuant to contract and distributorship basis, from which business it annually sells and ships products outside the State of Texas valued at in excess of \$50,000.

(f) Thorpe Products Company, Division of J. T. Thorpe Company, Inc. (herein called Thorpe), is a Texas corporation, and is engaged at Houston, Texas, in the distribution and fabrication of insulation products to and for insulation contractors and industrial employers, engaged in the building and construction industry, from which business it annually sells and ships products outside the State of Texas valued at in excess of \$50,000.

[fol. 246] (g) Techalloy Company, Incorporated (herein called Techalloy), is a Pennsylvania corporation with principal offices in the State of Pennsylvania and branch offices in the States of Connecticut, New York, Illinois, California, Georgia and Texas, and is engaged at Houston, Texas in conversion (redraw and reroll) of stainless steel and high nickel alloy, and in the sale and distribution of its products to insulation contractors, engaged in the building and construction industry, and to industrial employers, from which business it annually sells and ships products outside the State of Texas valued at in excess of \$50,000.

(h) In the course of its business, Thorpe regularly sells mitred fittings to Armstrong, and at all times material herein, Armstrong purchased said mitred fittings in the performance of its insulation contract on construction of a new ammonia plant for E. I. duPont De Nemours and Company at Victoria, Texas.

(i) At all times material herein, and in the performance of its contract to furnish insulation on an applied basis

at the American Oil Company, Barge Pipe Ammonia loading dock at Texas City, Texas, Johns-Manville purchased pre-cut stainless steel bands to hold insulation on pipe [fol. 247] lines from Techalloy.

(j) Respondent Local 22 is the collective bargaining representative of the employees of Armstrong and Johns-Manville.

(k) Respondents are not certified as the collective bargaining representative of the employees of Thorpe and Techalloy under the provisions of Section 9 of the Act, and at no time material herein have Respondents been recognized as the collective bargaining agent of the employees of Thorpe and Techalloy, nor have Respondents made any demands on Thorpe and Techalloy that they be recognized as bargaining agent.

(l) At no time material herein has Respondent International, Respondent Local 22 or Respondent Local 113 had any labor dispute with Armstrong or Johns-Manville.

(m) At all times material herein, Respondents have been engaged in a boycott of the products manufactured by Thorpe and Techalloy, and sold by them to Armstrong and Johns-Manville, as set forth in Findings of Fact 4(h) and (i) above, said boycott by Respondents being engaged in by them for the reasons set forth in Findings of Fact 4(k) above, and the failure of said products to include thereon [fol. 248] a label or "decal" signifying them to be products made by employee members of Respondent Local 22, or by employee members of other local unions affiliated with Respondent International.

(n) In furtherance of the aforesaid boycott of products manufactured by Thorpe and sold to Armstrong for use on its insulation contract at Victoria, Texas, as set forth in Findings of Fact 4(m) above, Respondent International and Respondent Local 113, on or about May 28, 1963, instructed, requested, and appealed to individuals employed



by Armstrong at Victoria, Texas, not to handle or install Thorpe's product.

(o) In furtherance of the aforesaid boycott of Techalloy's product sold to Johns-Manville for use at the Texas City, Texas, construction project, as set forth in Findings of Fact 4(m) above, Respondent International and Respondent Local 22, on or about July 19, 1963, instructed, requested, and appealed to individuals employed by Johns-Manville at Texas City, Texas, not to handle or install Techalloy's product, and on or about July 30, 1963, told Johns-Manville that its members would not be allowed to handle or install said product, and that Johns-Manville could not use said product on any job since Respondents would not put "union labels" on said product.

[fol. 249] (p) In furtherance of the aforesaid boycott of Thorpe's and Techalloy's products, as set forth in Findings of Fact 4(m) above, Respondents International and Local 22, on or about June 3, 1963, and on or about July 2, 1963, told Armstrong, Johns-Manville, and Houston Insulation and its other Member Employers that no fabricated fittings or other fabricated items would be installed by employee members of Respondents on any construction projects engaged in by the aforesaid employers unless said fabricated fittings or other fabricated items included thereon a label or "decal" signifying them to be products made by employee members of Respondents.

(q) As a result of Respondents' acts and conduct aforesaid, as set out in Findings of Fact 4(m), (n), (o) and (p) above, the employees of Armstrong refused in the course of their employment to handle or install Thorpe's product, and the employees of Johns-Manville refused in the course of their employment to handle or install Techalloy's product.

(r) By the acts and conduct set forth in Findings of Fact 4(m), (n), (o), (p) and (q) above, and by other means, including picketing, orders, directions, instructions, re-



quests and appeals, Respondents have engaged in, and have [fol. 250] induced and encouraged individuals employed by Armstrong, Johns-Manville, and by other persons engaged in commerce or in industries affecting commerce, to engage in, strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities or to perform services, and have threatened, coerced and restrained Armstrong, Johns-Manville, and other persons engaged in commerce or in industries affecting commerce.

(s) An object of the acts and conduct of Respondents set forth in Findings of Fact 4(m), (n), (o), (p), (q) and (r) above, was and is to force or require Armstrong, Johns-Manville, and other persons, to cease using, selling, handling, transporting, or otherwise dealing in the products of and to cease doing business with Thorpe and Techalloy.

(t) The acts and conduct of Respondents set forth in Findings of Fact 4(m), (n), (o), (p), (q), (r) and (s) above, occurring in connection with the operations of Armstrong, Johns-Manville, Thorpe and Techalloy, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to and do lead to labor disputes burdening and obstructing commerce [fol. 251] and the free flow of commerce.

5. It may fairly be anticipated that, unless enjoined, Respondents will continue and repeat the acts and conduct set forth in Findings of Fact 4(m), (n), (o), (p), (q), (r), (s) and (t) above, or similar or like acts and conduct.

#### Conclusions of Law

1. This Court has jurisdiction of the parties and of the subject matter of this proceeding, and under Section 10(1) of the Act is empowered to grant injunctive relief.

2. There is, and petitioner has, reasonable cause to believe that:

(a) Respondents are labor organizations within the meaning of Sections 2(5), 8(b) and 10(1) of the Act.

(b) Armstrong, Johns-Manville, Thorpe and Techalloy are engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

(c) Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii), subparagraph (B), of the Act, affecting commerce within the meaning of Sections 2(6) and (7) of the Act, and a continuation of these practices will impair the policies of the Act [fol. 252] as set forth in Section 1(b) thereof.

3. To preserve the issues for the orderly determination as provided in the Act, it is appropriate, just and proper that, pending the final disposition of the matters herein involved pending before the Board, Respondents, their officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them, be enjoined and restrained from the commission, continuation, or repetition, of the acts and conduct set forth in Findings of Fact 4(m), (n), (o), (p), (q), (r), (s) and (t) above, acts or conduct in furtherance or support thereof, or like or related acts or conduct the commission of which in the future is likely or may fairly be anticipated from Respondents' acts and conduct in the past.

Done at Houston, Texas, this 13th day of September, 1963.

Joe Ingraham, United States District Judge.

[fol. 254]

## APPENDIX TO PETITION

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

Civil No. 63-H-452

CLIFFORD W. POTTER, Regional Director of the Twenty-third Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, Petitioner,

v.

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS  
AND ASBESTOS WORKERS, AFL-CIO,

and

LOCAL 22, INTERNATIONAL ASSOCIATION OF HEAT AND FROST  
INSULATORS AND ASBESTOS WORKERS, AFL-CIO,

and

LOCAL 113, INTERNATIONAL ASSOCIATION OF HEAT AND FROST  
INSULATORS AND ASBESTOS WORKERS, AFL-CIO, Respondents.

ORDER GRANTING TEMPORARY INJUNCTION—  
September 13, 1963

This cause came on to be heard upon the verified petition of Clifford W. Potter, Regional Director of the Twenty-third Region of the National Labor Relations Board, for [fol. 254] and on behalf of said Board, for a temporary injunction pursuant to Section 10(1) of the National Labor Relations Act, as amended, pending the final disposition of the matters involved pending before said Board, and upon the issuance of an order to show cause why injunctive re-

lief should not be granted as prayed in said petition. The Court, upon consideration of the pleadings, evidence, briefs, argument of counsel, and the entire record in the case, has made and filed its Findings of Fact and Conclusions of Law, finding and concluding that there is reasonable cause to believe that Respondents have engaged in, and are engaging in, acts and conduct in violation of Section 8(b) (4)(i)(ii)(B) of said Act, affecting commerce within the meaning of Sections 2(6) and (7) of said Act, and that such acts and conduct will likely be repeated or continued unless enjoined.

Now, therefore, upon the entire record, it is

Ordered, Adjudged and Decreed that, pending the final disposition of the matters involved pending before the National Labor Relations Board, Respondents International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO; Local 22, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO; and Local 113, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO; their officers, representatives, agents, servants, employees, [fol. 255] attorneys, and all members and persons acting in concert or participation with them, be, and they hereby are, enjoined and restrained from:

In any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by Armstrong Contracting and Supply Corporation (herein called Armstrong), and Johns-Manville Sales Corporation (herein called Johns-Manville) to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service, or in any manner or



by any means, threatening, coercing, or restraining Armstrong, Johns-Manville; or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require Armstrong, Johns-Manville, or any other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of or to cease doing business with Thorpe Products Company, Division of J. T. Thorpe Company, Inc., and [fol. 256] Techalloy Company, Incorporated.

Done at Houston, Texas, this 13th day of September, 1963.

/s/ JOE INGRAHAM, United States District Judge.

---

[fol. 257]

CLERK'S NOTE:

"Trial Examiner John F. Funke's Decision, February 3, 1964 with Appendices A & B" is omitted from the record here as it appears on pages 176-192, *supra*.

---

[fol. 281]

CLERK'S NOTE:

"Decision and order, September 4, 1964" is omitted from the record here as it appears on pages 197-204, *supra*.

---

[fol. 292]

CLERK'S NOTE:

"Trial Examiner John F. Funke's Decision, February 3, 1964 with Appendices A & B" is omitted from the record here as it appears on pages 176-192, *supra*.



[fol. 312]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21910

HOUSTON INSULATION CONTRACTORS ASSOCIATION, Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, Respondent.

OPINION ON PETITIONER'S MOTION FOR STAY AND RESTRAINING  
ORDER—December 8, 1964

Before Rives, Brown and Wisdom, Circuit Judges.

Brown, Circuit Judge: Petitioner (Houston Insulation) in connection with its Petition for Review, moves for an order staying the decision and order of the Board, dated September 4, 1964, and for a restraining order against the Union (International Ass'n of Heat and Frost Insulators, and Locals 22 and 113 thereof) pending a determination of the issues involved in a full dress review by this Court. We have concluded that the stay should be granted [fol. 313] and that the motion for the restraining order should be denied.

Petitioner charged the Union with engaging in a secondary boycott in violation of §8(b)(4)(i) and (ii)(B). At the behest of the Board's Regional Director acting under §10(1) (which empowers him to seek appropriate injunctive relief), Judge Ingraham of the Southern District of Texas, after conducting a full hearing, found and concluded that there was reasonable cause to believe that the Union was engaging in unlawful conduct. Accordingly, the Union Respondents were enjoined from refusing to handle materials for nonunion contractors on jobs being performed by members of the Petitioner Association, pend-

ing a Board determination (see note 3, *infra*). The Trial Examiner agreed with the Regional Director and the District Court finding the two Locals—but not the International—guilty of an unlawful secondary boycott and recommended that a cease and desist order be issued. The Board however—apparently as a matter of law, not one of credibility choices—took the view that the Union had engaged only in protected primary activity and ordered the complaint dismissed. The Petitioner thereupon instituted this proceeding seeking reversal of this decision. In the course of this motion for interim relief, the General Counsel has expressed the purpose of seeking formal dissolution of the District Court temporary injunction.

Setting forth a persuasive showing of a substantial basis for its legal contentions as they bear on the likelihood of ultimate success in this Court on the legal issue of the [fol. 314] propriety of the Board's order and a convincing demonstration of irreparable harm in the meantime if the Union is allowed to resume the complained of activity, Petitioner asks that the Board's order be stayed, and an injunction pending appeal be entered.

Under the Act there can be no real question about the power of this Court to stay an order of the Board. The procedures governing a Board petition for enforcement to a Court of Appeals are set out in §10(e). The parallel section, 10(f), grants to "any person aggrieved by a final order of the Board" the right to petition for review in a Court of Appeals. Recognition of the Court's power to enter a stay order in a proceeding of either kind is then expressly made in §10(g):

"(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, *unless specifically ordered by the court*, operate as a stay of the Board's order." (Emphasis supplied)

Actually no serious contest seems to be made by the Board on the issuance of a stay. The Board has, rather, focused

its attention primarily on the asserted lack of jurisdiction in this Court to enter a restraining order at the instance of a private party.<sup>1</sup> The Court's power to enter a stay [fol. 315] being clear under the Act,<sup>2</sup> the only question is whether this is an appropriate case for an exercise of that power.

After a thorough examination of the papers filed by all parties, consideration of the proceedings in the District Court and those before the Trial Examiner and Board, we have concluded, without intimating how the issues should be resolved by a panel of this Court, that there is sufficient merit to Petitioner's position to justify preserving the status quo until the case is finally disposed of in this Court. Were Petitioner to ultimately prevail, the beneficial effect of our decision would largely be vitiated, if while awaiting hearing and disposition, the Union were permitted to resume its activities.

---

<sup>1</sup> Without now undertaking to determine whether, as urged by the Board's brief, these wide grants of power necessarily confine interim relief to that sought by the Board, not a private party, it is evident that the following from §§10(e) and (f) go a long way to reinforce the power to grant a stay implied in §10(g).

"(e) \* \* \* Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper \* \* \*"

"(f) \* \* \* Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper \* \* \*"

Likewise §10(h) reflects the policy that when courts under this structure are given power to issue restraining orders, etc., the Norris-LaGuardia Act, 29 USCA §§101 et seq., is not to be a bar.

<sup>2</sup> It is unnecessary to consider whether, apart from the Act, the Court has an inherent power to enter a stay. Cf. 28 USCA §1651.

The effect of the stay is such that it is not necessary for this Court—assuming, but not deciding, that it has the power—to issue an injunction in order to preserve the status quo. While it is true that ordinarily a §10(1) injunction expires upon final adjudication by the Board, our staying the Board's order effectually postpones its operative legal effect until enforced by this Court. Therefore [fol. 316] Judge Ingraham's order granting a temporary injunction which was to run "pending the final disposition of the matters involved,"<sup>3</sup> and which the records of the District Clerk show to be subsisting, remains in full force and effect so long as our stay continues. No further relief is needed or appropriate.

Accordingly, a stay will be entered as of the date of the application. Stay Granted.

RIVES, Circuit Judge, Dissenting:

The majority makes clear that the so-called "stay" which it grants is intended to have the force and effect of an injunction.<sup>1</sup> I must respectfully dissent because that seems to me beyond the jurisdiction of this Court.

The Norris-LaGuardia Act<sup>2</sup> deprives the courts of the United States of jurisdiction to issue any restraining order or temporary or permanent injunction in a case such as

---

<sup>3</sup> We do not read this language as going beyond the permissible scope of an injunction under §10(1)—"appropriate injunctive relief pending the final adjudication by the Board."

<sup>1</sup> See the concluding two paragraphs of Judge Brown's opinion.

<sup>2</sup> The opening section of that Act reads:

"No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter." 29 USCA §101.



this involving or growing out of a labor dispute, unless that jurisdiction has been subsequently conferred by the Labor Management Relations Act. See *Sinclair Refining* [fol. 317] *Co. v. Atkinson*, 1962, 370 U.S. 195, 203. When granting appropriate relief provided in section 10 of the latter Act, it is expressly provided that "... the jurisdiction of courts sitting in equity shall not be limited by sections 101-110 and 113-115 of this title." 29 U.S.C.A. 160(h). However, as the Supreme Court observed in *Sinclair Refining Co. v. Atkinson*, *supra*, that Act permits "injunctions to be obtained, not by private litigants, but only at the instance of the National Labor Relations Board . . ." (370 U.S. at 204).<sup>2</sup> See also *Amazon Cotton Mill Co. v. Textile Workers Union*, 4 Cir. 1948, 167 F.2d 183, 186, 187. Indeed, Congress expressly rejected a provision in section 12 of the House bill "for injunctions at the request of private persons, rather than by the Board, in cases like these."<sup>4</sup>

Of the sections relied on by the majority (its footnote 1), section 10(e) relates to petitions by the Board for enforcement of its order and section 10(f) provides for the grant of temporary relief to the Board but not to a private litigant. See 29 U.S.C.A. §160(e) and (f).

Jurisdiction to issue injunctive relief in a case of this kind, even on the Board's petition, is strictly limited to the period "pending the final adjudication of the Board with respect to such matter." Section 10(l) of the Act, [fol. 318] 29 U.S.C.A. §160(l). By its own terms the injunction expired on September 9, 1964, when the Board issued

---

<sup>2</sup> The only exception is a section not applicable to this case, 29 U.S.C.A. §186(e), which the Court commented "stands alone in expressly permitting suits for injunctions previously proscribed by the Norris-LaGuardia Act to be brought in the federal courts by private litigants under the Taft-Hartley Act. . . ." (370 U.S. 205, n. 19.)

<sup>4</sup> House Conference Report No. 510, June 3, 1947, on H.R. 3020, U.S. Code Cong. Serv., 80th Cong., 1st Sess. 1947, p. 1164.



its decision and order dismissing the complaint.<sup>5</sup> It seems clear to me that this Court has no jurisdiction to grant the private petitioner's motion for stay and thereby to reinstate the injunction or continue it in force.

I therefore respectfully dissent.  
[fol. 320]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21910

---

HOUSTON INSULATION CONTRACTORS ASSOCIATION, Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, et al., Respondents.

---

ORDER GRANTING PETITIONER'S MOTION FOR STAY AND DENYING MOTION FOR TEMPORARY RESTRAINING ORDER—Filed December 8, 1964

Before Rives, Brown, and Wisdom, Circuit Judges.

For the reasons stated in the majority opinion of the Court, rendered this date, It Is Ordered that the application for Stay is Granted as of September 17, 1964, and that the motion for a temporary restraining order be Denied.

Rives, Circuit Judge, Dissents.

[File endorsement omitted]

---

<sup>5</sup> "The final adjudication of the Board" is more limited than "the final disposition of the matters involved," the language of the district court upon which the majority seizes (its footnote 3) to stretch the terms of the injunction. Any such broadening or extension of the statutory language would have far-reaching effects not intended by Congress.

[fol. 321]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21910

---

HOUSTON INSULATION CONTRACTORS ASSOCIATION, Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD, et al., Respondents.

---

ORDER—Filed December 8, 1964

Before Rives, Brown, and Wisdom, Circuit Judges.

By the Court:

It Is Ordered that the Motion of the National Labor Relations Board to Strike from the Caption of this Case That Portion Which Names Local 22, International Association of Heat and Frost Insulators and Asbestos Workers, Local 113, International Association of Heat and Frost Insulators and Asbestos Workers; and International Association of Heat and Frost Insulators, AFL-CIO; as Respondents in the above entitled and numbered cause be, and the same is hereby Granted.

[fol. 322]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21910

---

NATIONAL LABOR RELATIONS BOARD, Respondent.

versus

NATIONAL LABOR RELATIONS BOARD, et al., Respondents.

---

ORDER—Filed February 2, 1965

Before Woodbury,\* Chief Judge, and Wisdom and Bell,  
Circuit Judges.

By the Court:

It Is Ordered that the Motion of the International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, and Locals 22 and 113, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO for leave to file brief amicus curiae in the above-entitled and numbered cause be, and the same is hereby Granted.

---

\* Chief Judge of the First Circuit sitting by designation.



Woodbury, Senior Circuit Judge: This is a petition to review and set aside an order of the National Labor Relations Board dismissing a complaint issued upon charges [fol. 325] filed in an association of contractors against two local unions and their parent union.

The petitioner, Houston Insulation Contractors Association, Contractors Association or simply Association, hereinafter, consists of a group of contracting companies in the Houston area banded together for the purpose, *inter alia*, of negotiating and administering collective bargaining agreements with Local 22 of the International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO. Article VI of the collective bargaining agreement in force between these parties at the time involved provided in material part: "The Employer agrees that he will not sublet or contract out any work described in Article XIII," which included "preparation" and "application" of coverings for the insulation of hot and cold surfaces such as pipes, boilers, tanks etc.

Johns-Manville Sales Corporation is a member of the Contractors Association. In 1963 it was engaged in applying insulation to pipe at a construction project at Texas City, Texas, within the territorial jurisdiction of Local 22. In order to secure the insulation to the pipe Johns-Manville's employees cut coils of stainless steel sheets into strips or bands used to hold the insulation around the pipe. In June or July Johns-Manville purchased pre-cut stainless steel bands from Techalloy Company, Inc., a non-union producer of metal products. Johns-Manville employees at the direction of their union officers refused to apply the pre-cut bands.

Armstrong Contracting and Supply Corporation is another member of the Contractors Association. In 1963 it [fol. 326] was engaged in applying asbestos insulation to pipes at a construction project in Victoria, Texas, which is not within the territorial jurisdiction of Local 22, but of Local 113 of the International Union. For several years



Armstrong had purchased straight lengths of premoulded asbestos insulation from Thorpe Products Company, a non-union firm, which Armstrong's union employees had mitered, that is to say, cut at angles with a saw and glued the cut sections together so that the straight-length material could be used to cover curves or angles in pipe. Originally mitering had been done on the job with hand tools. At the time involved, however, and apparently for several years before, mitering had been done in Armstrong's shop in Houston by its employee-members of Local 22 using power tools inconvenient to move and the mitered fittings delivered to the jobsite. In the summer of 1963 Armstrong purchased pre-mitered fittings from non-union Thorpe Products Company. Armstrong's employees on the Victoria job, members of Local 113, at their union officers' direction refused to apply these pre-mitered fittings.

The Contractors Association filed charges against the International Union and its Locals 22 and 113 on which general counsel for the Board issued a complaint charging that the refusals to apply the goods of Thorpe and Tech-alloy constituted an unlawful secondary boycott within the meaning of § 8(b)(4)(i) and (ii) (B) of the National Labor Relations Act as it now stands amended, 29 U.S.C. § 158(b)(4)(i) and (ii)(B),<sup>1</sup> asserting that at least "an object" of

<sup>1</sup> "It shall be an unfair labor practice for a labor organization or its agents—

• • • • •  
 "(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . , to engage in, a strike or refusal in the course of his employment to use, . . . process, . . . or otherwise handle or work on any goods, articles, materials, or commodities . . . or (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where in either case an object thereof is . . .

• • • • •  
 "(B) forcing or requiring any person to cease using, . . . handling, . . . or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . ."

[fol. 327] the refusal to apply, which admittedly amounts to coercion, was to require Johns-Manville and Armstrong to cease doing business with Thorpe and Techalloy. The International Union and the Locals denied that the refusals to use and apply the products of Thorpe and Techalloy constituted a secondary boycott. They asserted that the refusals were protected primary activity because the sole object thereof was to preserve work their members were entitled to perform by virtue of the ban on subcontracting in the collective bargaining agreement.<sup>2</sup>

After hearing, the trial examiner found that "this was not a boycott of nonunion products." And he ruled that "Articles VI and XIII of the agreement with the Contractors Association are lawful." Nevertheless he concluded that the refusal to handle Thorpe and Techalloy products was unlawful wherefore he recommended a cease and desist [fol. 328] order against the local unions but not against the International Union saying that the dispute was a local one and that he had "no evidence that the International directed it or intervened in it."

The trial examiner rested his conclusion of unlawful activity by the local unions on § 8(e) of the Act, 29 U.S.C. § 158(e), quoted in material part in the margin.<sup>3</sup> He said

<sup>2</sup> In the contract between Local 22 and the Contractors Association the employers agreed that in their operations outside the chartered territory of Local 22 they would abide by the rates of pay, rules and working conditions established by collective bargaining contracts between local insulation contractors and the local union in that territory. Local 113's contract with employers operating within its territorial jurisdiction where the work stoppage involving Armstrong's employees occurred contains a ban against subcontracting similar to the one in the contract between the Contractors Association and Local 22.

<sup>3</sup> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, . . . whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, . . . or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract . . . containing such an agreement shall be to such extent unenforceable and void: *Provided,*

that the agreement between the Contractors Association and Local 22 was "clearly a contract aimed at the exemption of Section 8(e)." But he said that the exemption did not apply because the evidence was clear that mitering and cutting bands, even when performed by Armstrong and Johns-Manville employees, was performed at their shops and not at the jobsite. In addition he ruled that, even if the workers were entitled to preserve the work of mitering and cutting bands by the contract, they were not entitled under the rule of the so-called *Sand Door* case, *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958), to resort to economic coercion to enforce the contract.

The three-member panel to which the Board delegated its powers pursuant to § 3(b) of the Act disagreed with the trial examiner and ordered the complaint dismissed [fol. 329] in its entirety. Without discussing the impact of § 8(e) of the Act, although that section provided the basis for the trial examiner's decision, the panel held that the activities of the two local unions were primary because "the object" thereof was to enforce the ban on subcontracting work properly claimed by the employees under the collective bargaining agreement the lawfulness of which it said appeared to be conceded. On the basis of its conclusion of no unlawful activity by the local unions, it dismissed the complaint as to the International Union.

One member of the panel dissented from the order insofar as it dismissed the charge against Local 113. The majority of the panel pointed out that although Local 113 had no contract with the Contractors Association, nevertheless the Association had agreed with Local 22 that its member companies when operating outside the territorial jurisdiction of that union would "abide by the rates of

---

That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, . . ."

pay, rules and working conditions established by collective bargaining agreements between the Local (sic) insulation contractors and the local union in that jurisdiction" and that Local 113's contract in its jurisdiction contained a ban on subcontracting identical with that in Local 22's contract with the Association. Wherefore the majority held that whether Local 113 be "regarded as a third-party beneficiary of Local 22's bargaining contract or as agent of Local 22, it had the right to insist, in accordance with the terms of the contract, that Armstrong adhere to the lawful no-subcontracting clause." The dissenting member of the panel said that Local 113 was not a third-party beneficiary of Local 22's bargaining contract with Armstrong and that there was nothing to show that it was [fol. 330] acting as agent for Local 22. He considered that since Local 113 had no agreement with the Contractors Association, its attempt to enforce the contract for the benefit of Local 22 constituted unlawful secondary activity.

The petitioner insists in this court that both the facts and the law require the Board to find that all three unions had violated § 8(b)(4)(i) and (ii)(B) of the Act.

On the facts, the petitioner contends that the record conclusively shows that "an object" of the refusals to apply was to force Johns-Manville and Armstrong to cease doing business with Techalloy and Thorpe. In support of this contention it would have us give conclusive effect to the testimony of one Brooks Baker, an officer of Local 22 and vice-president of the International Union, who at one point testified that he had instructed the men not to handle the products of Thorpe and Techalloy because "we are not in agreement with Thorpe or Techalloy." This testimony does indicate that Baker at least may have believed that "an object" of the refusals to handle and apply was to force Johns-Manville and Armstrong to cease doing business with Thorpe and Techalloy. But the Board was not required as a matter of law to accept Baker's statement as gospel in the face of ample testimony, including later testimony of Baker himself, to the effect



that the unions' objective was work preservation and in the face of the undisputed testimony that although Thorpe and Techalloy were non-union employers, neither local union had ever protested the use or application of any of their other products purchased by Johns-Manville or Armstrong but only protested the pre-cut bands and pre-mitered [fol. 331] fittings. It may well be that the union officials hoped and expected, certainly we may assume that they would not have minded, if a result of their members' refusal to use and apply the bands and fittings was to put pressure on Techalloy and Thorpe as non-union employers. But hopes and expectations do not necessarily constitute "objects." An illegal "object" is something more than a result, even an inevitable result, of a work stoppage for a legitimate reason. Otherwise the right to strike would for practical purposes be nullified, a result which Congress clearly did not intend. See *Retail Clerks Union Local 770 v. NLRB*, 296 F.2d 368, 373 (C.A.D.C. 1961). The distinction to be drawn as best one can is between an object and a consequence. See *Local 761, International Union of Electrical Workers v. NLRB*, 366 U.S. 667, 672 *et seq.* (1961).

The petitioner also would have us find conclusive evidence of an unlawful union object in its use of gummed labels or decals. These were supplied by the International Union to employers under contract with its locals and were applied by the union workers to the goods they made. The decals bore serial numbers by which the employer could be identified. When Johns-Manville and Armstrong employees received the Techalloy bands and Thorpe mitered fittings without decals they refused to apply them.

The use of decals is in itself a neutral fact. The decals could be used as a means of boycotting non-union goods or they could be used as a means of policing the ban on subcontracting. There is ample testimony in the record to support the conclusion that in this case the decals were used to police the ban on subcontracting. Moreover, there is undisputed testimony that other products of Thorpe and [fol. 332] Techalloy purchased by Armstrong and Johns-



Manville, which of course did not bear union decals, were not boycotted, and there is testimony that certain products made by union members and labeled as such were not applied when the serial numbers on the decals indicated that the products were not fabricated by employees entitled to the work under the contract.

Finally the petitioner relies on four other cases involving the same International Union and various of its locals as establishing an illegal pattern of union conduct. Apart from the broad proposition that past misconduct is not conclusive evidence of present guilt, the cases relied upon are clearly distinguishable. Three of them, *International Association etc. and Local 24 (Speed-Line Mfg Co., Inc.)*, 137 NLRB 1410 (1962); *International Association etc. and Local 125 (Insul-Caustic Corp.)*, 139 NLRB 659 (1962), and *International Association and Local 2 (Speed-Line Mfg Co., Inc., and Fibrous Glass Products, Inc.)*, 139 NLRB 688 (1962), involved "premolded" fittings, not "prefabricated" ones as in the case at bar. The distinction, as the Board pointed out, is crucial, for prefabricated fittings are essentially hand made and could and customarily had been prepared by members of International's local unions, whereas premolded fittings are factory made with the use of heat and heavy machinery to produce curved or "L" shaped insulation. Neither Thorpe nor Armstrong makes or has the facilities to make premolded fittings. Nor do the members of the locals have the skills to make such fittings. Thus in the cases cited above the Board quite reasonably concluded that in objecting to the use of premolded fittings the unions were not in fact seeking [fol. 333] to obtain work claimable under their contracts but instead were objecting to the non-union status of the manufacturers of the premolded fittings.

The fourth case relied upon by the petitioner was decided by the Board subsequent to the case at bar and involved the same parties. *Local 22 International Association etc. and Houston Insulation Contractors Association (Mundet Cork Co.)*, 150 NLRB 156 (1965). In that case

members of Local 22 employed by Mundet Cork Co. refused to apply aluminum jacketing supplied by Johns-Manville ostensibly because it did not bear the union decal although in fact it had been made by union labor. The case is a peculiar one but it is readily distinguishable on the trial examiner's finding that the particular aluminum jacketing made by Johns-Manville had never been made and could not have been made by the Mundet employees and hence was not work within the contractual ban on subcontracting.

On the law, the petitioner relies primarily upon § 8(e) of the Act quoted in material part in footnote 3, *supra*. It asserts and we agree that the proviso exempting subcontracting jobsite work in the construction industry does not apply because the Board did not disturb the trial examiner's finding that the mitering and cutting of bands, even when performed by Armstrong and Johns-Manville employees, was performed in their shops and not at the jobsite. But we do not agree with the petitioner that § 8(e) absent its proviso renders the contractual ban on subcontracting unenforceable and void.

[fol. 334] It is, of course, true that the agreement not to subcontract the work of preparation or application of insulation materials is in a certain sense an agreement whereby the employer agrees to refrain from handling, using or otherwise dealing in the products of another employer, if not also an agreement not to do business with another person. But to hold that a provision in the collective bargaining agreement against subcontracting was void and unenforceable because of its secondary effects would not square with *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), in which the Court held that "contracting out" work previously performed by members of an existing bargaining unit was a statutory subject of collective bargaining under § 8(d) of the Act. Section 8(e) was aimed at so-called "hot cargo" agreements whereby a union in effect forced employers to agree in advance not to do business with other employers with whom the union was not in agree-

ment. It was not the congressional purpose to outlaw such traditional and typical activity as seeking to guarantee preservation of work traditionally done by a bargaining unit. *NLRB v. Joint Council of Teamsters No. 38*, 338 F.2d 23, 28 (C.A. 9, 1964), and cases cited. In short, § 8(e) applies only to those agreements which on their face require an employer to cease or refrain from handling, using or otherwise dealing in the products of another employer with whom the union has a dispute. "Primary subcontracting claims, on the other hand, fall outside the ambit of § 8(e) . . . ." *Orange Belt District Council of Painters, No. 48 v. NLRB*, 328 F.2d 534, 537, 538 (C.A.D.C. 1964). An agreement banning the subcontracting of preparation work such as the one in the case at bar, not being a "hot [fol. 335] cargo" agreement or on its face an attempt at a secondary boycott *in futuro*, § 8(e) does not apply.

We agree with the Board's dismissal of the complaint as to Local 22. We do not, however, agree with its dismissal of the complaint as to Local 113.

The problem presented by the refusal of the members of Local 113 to apply the pre-mitered fittings is so far as we know unique. As we have already pointed out Local 113 had no contract with Armstrong, although the Contractors Association of which Armstrong was a member had a contract with Local 22 which provided that members when operating outside the Local's jurisdiction "abide by the rates of pay, rules and working conditions established by collective bargaining agreements between the Local (sic) insulation contractors and the local union in that jurisdiction" and Local 113's bargaining contract in its jurisdiction contained a ban on subcontracting identical with that in Local 22's contract with the Contractors Association. On this basis the Board held that "Whether Local 113 is regarded as a third-party beneficiary of Local 22's bargaining contract or as agent of Local 22 it had the right to insist, in accordance with the terms of the contract, that Armstrong adhere to the lawful no-subcontracting clause." We do not agree.

The record is clear, as the trial examiner found, that mitering fittings would not have been done by members of Local 113 at the jobsite in Victoria, Texas, but would have been done by members of Local 22 employed by Armstrong at its shop in Houston. Thus the third party [fol. 336] beneficiary theory is inapplicable because Local 113 would not have reaped any benefit from Local 22's contract. The agency theory has no factual support in the record. Moreover, we think the question presented by the behavior of Local 113 is not to be framed in terms of principles of the law of contracts or agency, developed in other contexts for other purposes. The fact of the matter is that Local 113 put economic pressure on an employer with whom it had no collective bargaining agreement to secure benefits to employees in another unit, Local 22. The question is whether such action by Local 113 comports with the underlying purposes and objectives of the Act. We think it does not.

Since Local 113 was not attempting to procure work for its members (they would not have done the mitering anyway) if it was not attempting to force Armstrong to cease and refrain from doing business with Thorpe, it was engaging in a controversy not its own but in Local 22's controversy with Armstrong. No doubt Local 113 had an emotional interest in coming to the aid of its sister local. But it had no economic interest in Local 22's claim of breach of contract. We think an emotional interest is too weak to justify conduct which necessarily has coercive impact on a neutral employer. Even if, strictly speaking, Local 113 was not engaged in a secondary boycott, it was coercing Armstrong not for its own benefit but for the benefit of another local at the expense of a neutral employer. We think the thrust of the Act, particularly § 8(b)(4), as set out in many secondary boycott cases<sup>4</sup> is

<sup>4</sup> See *NLRB v. Denver Bldg. Council*, 341 U.S. 675, 692 (1951), in which the Court described the congressional objectives of the Act as "... of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."



[fol. 337] to require each union to restrict its economic coercion to its own labor disputes and not to use that weapon in aid of another union.

Since we are affirming the order of the Board in part and reversing it in part the basis for the Board's declining to pass on the involvement of the International Union, i.e., its finding that neither local had violated the Act, is destroyed. The case must go back to the Board for decision of the question of the International Union's participation in Local 113's work stoppage.

The Order of the Board is enforced in part and reversed in part, and the case is remanded to the Board for further proceedings consistent with this opinion.

[fol. 338]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,910

HOUSTON INSULATION CONTRACTORS ASSOCIATION, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

DECREE—Entered March 31, 1966

Before: Woodbury,\* Wisdom and Bell, Circuit Judges.

By the Court:

This Cause came on to be heard upon a petition of the Houston Insulation Contractors Association to review and set aside an order of the National Labor Relations Board issued on September 4, 1964, dismissing a complaint against

[File endorsement omitted]

\* Senior Judge of the First Circuit sitting by designation.



International Association of Heat and Frost Insulators and its Locals 22 and 113. The Court heard argument of respective counsel on March 25, 1965, and has considered the briefs and transcript of record filed in this cause. On March 9, 1966, the Court, being fully advised in the premises handed down its opinion affirming the said order of the Board in part and reversing in part, and remanding the case to the Board for further proceedings consistent with its opinion. In conformity therewith it is hereby

Ordered, Adjudged, and Decreed by the United States Court of Appeals for the Fifth Circuit that that part of the Board's order dismissing a complaint against Local 22, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO be affirmed and that the part of the order dismissing the complaint against International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, and its Local 113, be reversed.

[fol. 339] It Is Further Ordered, Adjudged and Decreed that the case be remanded to the Board for further proceedings consistent with the opinion of this Court.

Entered Mar 31 1966.

[fol. 340] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 341]

## SUPREME COURT OF THE UNITED STATES

No. —, October Term, 1965

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

HOUSTON INSULATION CONTRACTORS ASSOCIATION.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT  
OF CERTIORARI—June 8, 1966

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 6th, 1966.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 8th day of June, 1966.

[fol. 342]

## SUPREME COURT OF THE UNITED STATES

No. 206—October Term, 1966

HOUSTON INSULATION CONTRACTORS ASSOCIATION, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

## ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted,

and set for oral argument immediately following Nos. 110 and 111. The case is consolidated with No. 413 and a total of one hour is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 343]

---

SUPREME COURT OF THE UNITED STATES

No. 413—October Term, 1966

---

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

HOUSTON INSULATION CONTRACTORS ASSOCIATION.

---

ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and set for oral argument immediately following Nos. 110 and 111. The case is consolidated with No. 206 and a total of one hour is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.

FILED

JUN 8 1966

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1966

No. ~~1285~~ 206

HOUSTON INSULATION CONTRACTORS ASSOCIATION,  
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

W. D. DEAKINS, JR.  
2013 First City National Bank  
Building  
Houston, Texas 77002

*Counsel for Petitioner*

*Of Counsel:*

VINSON, ELKINS, WEEMS & SEARLS  
2100 First City National Bank Bldg.  
Houston, Texas 77002

## INDEX

|  | PAGE |
|--|------|
| Opinions below .....   | 1    |
| Jurisdiction .....   | 2    |
| Questions presented .....  | 2    |
| Statutes involved .....  | 3    |
| Statement .....  | 3    |
| Reasons for granting the writ .....  | 7    |
| 1. The decision of the court below limits the application<br>of the construction provision exemption of the Na-<br>tional Labor Relations Act beyond what was intend-<br>ed by the Congress in its enactment .....                         | 7    |
| 2. The decision below is in conflict with a decision of<br>the Court of Appeals for the Seventh District .....   | 10   |
| 3. The Decision below misconstrues this Court's decision<br>in Universal Camera Corp. v. N.L.R.B. so as to nul-<br>lify and conflict with this Court's decision in<br>N.L.R.B. v. Denver Building and Construction<br>Trades Council ..... | 13   |
| Conclusion .....   | 15   |
| Appendix A .....   | 1a   |
| Appendix B .....   | 3a   |
| Appendix C .....   | 9a   |
| Appendix D .....   | 22a  |
| Appendix E .....   | 24a  |

## TABLE OF CASES

|  |   |
|--|---|
| Allen Bradley Co. v. Local No. 3, I.B.E.W., 325 U.S. 797<br>(1945) .....   | 1 |
| Department & Specialty Store Employees Union, Local 1265<br>v. Brown, 284 F. 2d 619 (9th Cir. 1960) cert. denied 366<br>U.S. 934 ..... | 9 |



|  | PAGE       |
|--|------------|
| Houston Insulation Contractors Association v. National Labor Relations Board, 148 N.L.R.B. 886, 357 F. 2d 182 (5th Cir. 1966) .....  | 1          |
| Local 1976, United Brotherhood of Carpenters and Joiners of America v. National Labor Relations Board, 357 U.S. 93 (1958) .....  | 12         |
| NLRB v. Denver Building and Construction Trades Council, 341 U.S. 675 (1951) .....   | 12, 13, 14 |
| NLRB v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local 294, 342 F. 2d 18 (2nd Cir. 1965) .....  | 11         |
| NLRB v. Local 11, United Brotherhood of Carpenters and Joiners of America, 242 F. 2d 932 (6th Cir. 1957) .....   | 8          |
| NLRB v. Milk Drivers and Dairy Employees Local Union 584, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 341 F. 2d 29 (2nd Cir. 1965) .....                        | 14         |
| NLRB v. National Woodwork Manufacturers Association, 354 F. 2d 594 (5th Cir. 1965) .....   | 10, 12     |
| NLRB v. Texas Natural Gasoline Corp., 253 F. 2d 322 (5th Cir. 1958) .....  | 9          |
| NLRB v. Washington-Oregon Shingle Weavers' District Council, et al, 211 F. 2d 149 .....  | 8, 9, 12   |
| Sound Shingle Co., 101 N.L.R.B. 1159 (1952) .....  | 8          |
| United Association of Pipe Fitters Local Union No. 539 and United Association of Plumbers and Gas Fitters Local Union No. 15 and American Boiler Manufacturers Association, 154 N.L.R.B. No. 11 (1965) ..... | 10         |
| Universal Camera Corp. v. NLRB, 340 U.S. 474 (1950).....   | 13         |

## Statute

|   |  |
|---|--|
| National Labor Relations Act, as amended, 29 U.S.C. 158 |  |
| Section 8(b)(4)(i) .....                                |  |
| Section 8(b)(4)(ii)(B) .....                            |  |
| Section 8(e) .....                                      |  |

**Miscellaneous**

|   |       |
|---|-------|
| II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 .....                     | 9; 11 |
| II Legislative History 1432 (1959) .....  | 12    |
| Burstein, The "Hot Cargo" Clause and L.M.R.D.A. ....  | 11    |
| Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257 (1959) .....    | 12    |
| H.R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess., Sept. 3, 1959 .....                                     | 11    |
| Symposium on the Labor Management Reporting and Disclosure Act of 1959, at 888, 891 (Slovenko ed. 1961) ..... | 11    |

IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1965

No. 1388.....

HOUSTON INSULATION CONTRACTORS ASSOCIATION,  
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

*To the Honorable, the Chief Justice of the United States  
and the Associate Justices of the Supreme Court of the  
United States:*

The Petitioner, Houston Insulation Contractors Association, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on March 31, 1966.

**OPINION BELOW**

The opinion of the Court of Appeals for the Fifth Circuit is reported at 357 F. 2d 182. The decision of the National Labor Relations Board and the Trial Examiner is reported at 148 N.L.R.B. 886.

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on March 31, 1966, and a copy thereof is appended to this petition in the Appendix at pp. 9a-21a as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

In a proceeding before the National Labor Relations Board, the Petitioner filed a charge against the International Association of Heat and Frost Insulators and Asbestos Workers and Local Unions No. 22 and 113, affiliated with the International Union, upon which a complaint was issued charging that refusals to apply the goods of Thorpe Products Corporation (Thorpe) and Techalloy Company, Inc. (Techalloy) constituted an unlawful secondary boycott within the meaning of §§ 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended. 29 U.S.C. §§ 158(b)(i) and (ii)(B).

The Trial Examiner recommended a cease and desist order against the two local unions based upon the provisions of § 8(e) of the Act, 29 U.S.C. § 158(e), in that the provisions of the labor contract between Petitioner and the Unions was a violation of §§ 8(b)(4)(i) and (ii)(B), and that the exemption of § 8(e) did not apply because the evidence was clear that *the work performed on the material by Thorpe and Techalloy was performed at their shops and not at the jobsite.*

The Board dismissed the complaint in its entirety without discussing the impact of § 8(e) of the Act, although the Trial Examiner's decision was based thereon. The Board held that the activities of the two local unions were primary because "the object" thereof was to enforce a ban on subcontracting work contained in the labor agreement.

The Court of Appeals affirmed the order of the Board in part and reversed it in part, holding that § 8(e) applies only to those labor contracts which on their face require an employer to cease or refrain from handling, using or otherwise dealing in the products of another employer with whom the union has a dispute. The Court sustained the Board in the dismissal of the charge against Local 22, and ignored direct and undisputed evidence that "an object" of the refusal to handle the products was a secondary boycott. The questions presented are:

1. Whether labor contract clauses proscribing prefabrication and subcontracting can be lawfully extended to off-jobsite work performed by the employees of secondary employers under § 8(e) of the National Labor Relations Act?

2. Have the requirements of substantial evidence necessary to support a dismissal of a case arising under §§ 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act been met, where undisputed testimony shows an unlawful object in the refusal to handle the goods and material of secondary employers, and other testimony shows other objects of such refusals to handle?

### **STATUTES INVOLVED**

The pertinent portions of the National Labor Relations Act, 29 U.S.C. 158, §§ 8(b)(4)(i) and (ii)(B) and (e) thereof are set forth in the Appendix, at pp. 1a to 2a as Appendix A.

### **STATEMENT**

These cases arose out of charges filed by Petitioner on August 8, 1963, charging that the International Association of Heat and Frost Insulators and Asbestos Workers and Local Unions No. 22 and 113, affiliated therewith, vio-



lated the provisions of §§ 8(b)(4)(i) and (ii)(B) of the Act by inducing the employees of Johns-Manville Sales Corporation (Johns-Manville) and Armstrong Contracting and Supply Corporation (Armstrong), members of the Association, to refuse to install certain insulation material with "an object" of causing those employers to cease doing business with Techalloy and Thorpe, respectively. (R. 6-9).

The charging party, and Petitioner here, is an association of insulation contractors of which Johns-Manville and Armstrong are members. They are engaged in the construction industry and were signatories to a contract with Local Union No. 22, which contained what are known as a "preparation clause" and a "subcontracting clause," which provided in pertinent part:

#### "Article VI

The Employer agrees that he will not sublet or *contract out* any work described in Article XIII \* \* \*.

\* \* \*

#### "Article XIII

This Agreement covers the rates of pay, rules and working conditions of all Mechanics and Improvers engaged in the *preparation, distribution and application* of pipe and boiler coverings, insulation of hot surfaced ducts, flues, etc., also the covering of cold piping and circular tanks connected with the same and all other work included in the trade jurisdictional claims of the Union." (emphasis supplied) (R. 190-191)

Johns-Manville was engaged in applying insulation to pipe at a construction project in Texas City, Texas, by employees who are members of Local 22 and working within its jurisdiction. Johns-Manville purchased pre-cut

stainless steel bands from Techalloy, a non-union producer of metal products. The employees of Johns-Manville, at the direction of the Union, refused to apply the pre-cut bands at the jobsite.

Armstrong was engaged in applying insulation to pipes at a construction project at Victoria, Texas, under the jurisdiction of Local 113, and there was no contract in effect between those parties. For several years, Armstrong had purchased straight lengths of premolded asbestos insulation from Thorpe, a non-union contractor. Armstrong's employees in its shop at Houston, had mitred these pieces of straight length material in order that they would be available to cover curves and angles of pipe, and because power tools, which were difficult to move, were used in the process. In 1963 Armstrong purchased pre-mitred fittings from Thorpe, and Armstrong employees, who were members of the Union, refused to apply these materials at the direction of the Union.

Brooks Baker, a Vice President of the International Union who is also Secretary of Local 22, testified that the Union had instructed its members not to handle the products of Thorpe and Techalloy *because they were not in agreement with and had no contract with Thorpe and Techalloy.* (R. 78-79). It was never claimed by the witness that this was not one of the objects or reasons why the Union instructed its members not to handle the products of Thorpe and Techalloy, and it remains undisputed that they were non-union contractors, which was an object of the refusal to handle their materials. Subsequently, Baker testified that the only instance the Union told its members not to handle the products of Thorpe and Techalloy was when they were prefabricated and that it would be a violation of their working agreement to handle those products. (R. 80-81)

A written communication by Union Vice President Baker which detailed the use of and reasons for applying Union decals on materials *pre-prepared* off the jobsite, to identify the member who performed the off-jobsite work, and to show that the materials were *union-made*, indicates a like purpose. (R. 114-115).

The Trial Examiner found that the refusal of the Union to handle the products of Thorpe and Techalloy "was not a boycott of non-union products" and held that Articles VI and XIII of the Agreement were lawful, and that the dispute was a local one and that there was no evidence of involvement by the International Union.

The basis of the Trial Examiner's decision, that the activity of the Unions was unlawful, was that the contract between the Petitioner and Local 22 was "clearly a contract aimed at the exemption of Section 8(e)," but the exemption did not apply because the work of mitreing and cutting bands, even when performed by employees of Armstrong and Johns-Manville, was performed in *off-jobsite* shops, and, further, even if the Union was entitled to preserve the work of mitreing and cutting bands, they were not entitled to resort to economic coercion to enforce the contract. (R. 30-47).

The Board reversed the Trial Examiner and held that the activities of the two locals were primary because "the object" thereof was to enforce the ban on subcontracting work properly claimed by the employees under the collective bargaining agreement with Local 22. It dismissed the complaint as to the International Union. (R. 218-220).

The Court below said that the testimony of Union Vice President Baker indicated that "an object" of the refusals to handle and apply was to force Johns-Manville and Armstrong to cease doing business with Thorpe and Techalloy,

but held that the Board was not required to accept that testimony in the face of other testimony that the Union's objective was work preservation, and that the use of "decals" was a means of policing the ban on subcontracting and not to prevent the handling of non-union goods. (R. 330).

The Court below held that the proviso of Section 8(e) exempting the subcontracting of *jobsite work* in the construction industry did not apply because the Board did not reverse the Trial Examiner's finding that the mitreing and cutting of bands, when performed by Armstrong and Johns-Manville employees, was performed in their shops, not at the jobsite. The Court below held that Section 8(e), absent its proviso, does not render the contractual ban on subcontracting unenforceable and void, and it applies only to agreements which, on their face, require an employer to cease or refrain from handling, using or otherwise dealing in the products of another employer with which the Union has a dispute, and "primary subcontracting" claims fall outside the ambit of § 8(e). (R. 333-334).

This application is not concerned with other issues in the case.

### **REASONS FOR GRANTING THE WRIT**

1. **The Decision of the Court Below Limits the Application of the Construction Provision Exemption of the National Labor Relations Act Beyond What Was Intended by the Congress in its Enactment.**

The Court below has interpreted the provisions of § 8(e) of the Act to apply only to those agreements which on their face require an employer to cease or refrain from handling, using or otherwise dealing in the products of another employer with whom the union has a dispute. (R. 334). The decision in that regard is clearly contrary to this Court's

decision in *Allen Bradley Co. v. Local Union 3, I.B.E.W.*, 325 U.S. 797 (1945).

In *NLRB v. Washington-Oregon Shingle Weavers' Dist. Council, et al*, 211 F. 2d 149 (1954), the Ninth Circuit rejected that theory and affirmed the Board in *Sound Shingle Co.*, 101 NLRB 1159, 1161 (1952), where it stated:

"It is true that in the usual type of secondary boycott there is a dispute with one employer followed by secondary activity against another employer with whom he has business dealings, to force a cessation of business with the primary employer. But because this kind of secondary boycott is more usual or more frequent does not mean that it is the *only* kind Congress intended to reach. We do not believe that, as to the type of conduct now before us, Section 8(b)(4)(A) contemplates the existence of an active dispute, over specific demands, between the union and the producer of the goods under union interdict. The legislative history surrounding the enactment of Section 8(b)(4)(A), while difficult as a guide in many respects, does furnish reasonably clear guidance on the precise issue here. The Senate Committee Report on this section indicates that no demand upon the producer of the boycotted product is necessary to sustain the charge that a union has engaged in the type of 'secondary boycott' we have here under consideration." (Citing *Allen Bradley Co. v. Local Union 3* and the Legislative History of the 80th Cong. fn. 7.)

The Court of Appeals for the Sixth Circuit in *NLRB v. Local 11, United Brotherhood of Carpenters and Joiners of America*, 242 F. 2d 932 (1957), likewise said:

"The fact that there was not an active labor dispute between the respondents and the producers of the doors would not serve to immunize the respondents



from the terms of § 8(b)(4)(A) of the Act, which neither literally nor implicitly requires the existence of such a dispute as a condition of its operation. *N.L.R.B. v. Washington-Oregon Shingle Weavers' Dist. Council*, 9 Cir., 1954, 211 F. 2d 149, 152-153."

The legislative history of the Act and the plain language of § 8(e) show that the restrictive application of the secondary boycott provisions of the Act by the Court below was in error. In commenting on § 8(e) and its proviso, Senator Kennedy, in his statements concerning the Senate-House Conference Report on the amendments, at II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, as published by the NLRB, p. 1433, pointed out:

"This proviso affects only section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). The *Denver Building Trades* (341 U.S. 675) and the *Moore Drydock* (92 N.L.R.B. 547) cases would remain in force.

"It should be particularly noted that the proviso relates only to the 'contracting or subcontracting of work to be done at the site of the construction.' The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite." (Emphasis added.)

Thus the construction of § 8(e) by the Court below distorts the plain language of the statute so as to reach results which were unintended. *Department & Specialty Store Employees Union, Local 1265 v. Brown*, 284 F. 2d 619 (9th Cir. 1960) cert. denied 366 U.S. 934; *N.L.R.B. v. Texas Natural Gasoline Corp.*, 253 F. 2d 322 (5th Cir. 1958).

There is a conflict among the Courts of Appeal as to various aspects of the application of Section 8(e) which

can only be resolved by this Court.\* The Petition for a Writ of Certiorari in *National Labor Relations Board v. National Woodwork Manufacturers Assn. No. 1247*, October Term 1965, states that the issue goes to the heart of Section 8(e) and presents a clear-cut question of statutory construction that only this Court can lay to rest with which we agree.

## 2. The Decision Below is in Conflict with a Decision of the Court of Appeals for the Seventh District.

Because of a direct conflict in the decision of the United States Court of Appeals for the Fifth Circuit here, and the decision of the United States Court of Appeals for the Seventh Circuit in *National Woodwork Manufacturers Association*, 354 F. 2d 594 (1965),\*\* and the decision of the National Labor Relations Board in *United Association of Pipe Fitters Local Union No. 539* and *United Association of Plumbers and Gas Fitters Local Union No. 15* and *American Boiler Manufacturers Association*, 154 N.L.R.B. No. 11 (1965), submitted to the Court of Appeals for the Eighth Circuit on May 9, 1966 and entitled *American Boiler Manufacturers Association v. National Labor Relations Board*, No. 18,106, 18,107, 18,200, this Court should grant review.

The conflict in the decisions of the United States Courts of Appeals has and will bring labor strife to the construction industry due to the uncertainty of the effect of the

\* See *Meat Drivers Local Union 710 v. Labor Board*, 335 F. 2d 709, 713-717 (C.A.D.C.); *Orange Belt District Council of Painters v. Labor Board*, 328 F. 2d 534, 537-538 (C.A.D.C.); *Truck Drivers Union Local 413 v. Labor Board*, 334 F. 2d 539, 548 (C.A.D.C.), certiorari denied, 379 U.S. 916; *Lewis v. Labor Board*, 350 F. 2d 801, 802 (C.A.D.C.); *Labor Board v. Joint Council of Teamsters*, 338 F. 2d 23, 28 (C.A. 9); *Todd Shipyards Corp. v. Marine and Shipbuilding Workers Union*, 344 F. 2d 107 (C.A. 2).

\*\* Appendix E.

exemption of § 8(e) of the Act to off-jobsite prefabrication work performed by the employees of secondary employers which has been brought about by a misconstruction of the provisions of the pertinent provisions of the Act by the Board and the Court below.

The language of § 8(e) is plain and unambiguous in that the exemption here to be considered does not apply to the "contracting or subcontracting of the work to be done at the site of the construction," and the Court of Appeals, as well as the Board, have enlarged the scope of the proscription by finding that the picketing is primary in that it was directed against Johns-Manville and Armstrong to protect the work of the employees covered by the agreement.

The Court of Appeals for the Second Circuit in *NLRB v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local 294*, 342 F. 2d 18 (1965), enforced an order of the Board prohibiting a boycott of suppliers delivering ready-mix concrete and held that the union was not insulated from the provisions of § 8(b)(4)(ii)(A) by the construction industry proviso to § 8(e) since the proviso is limited to "work done at the site of the construction," and held that "it does not sanction a boycott against suppliers who do not work on the jobsite." Citing, Burstein, *The "Hot Cargo" Clause and L.M.R.D.A., Symposium on the Labor Management Reporting and Disclosure Act of 1959*, at 888, 891 (Slovenko ed. 1961). H.R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess., Sept. 3, 1959, at 39, in 1 N.L.R.B., *Legislative History of the Labor Management Reporting and Disclosure Act of 1959*, 943 (1959). It is significant to point out that the Court and Board both held that the act of mixing previously loaded ingredients in ready-mix trucks once they reached the project was not

"on-site work," as the union claimed, but merely the final act of the delivery process.

The Legislative History does not indicate any departure from the plain language of the Act to be permissible if the work is performed off the jobsite. Instead, the Legislative History of the Act makes clear that the purpose of the Landrum-Griffin bill was to extend the "hot-cargo" provisions of the Senate bill, which was theretofore applied only to Teamsters, to all agreement between an employer and a labor union to which the employer agrees not to do business with another concern. II Leg. Hist. 1432 (1959).

It is apparent that the construction placed upon the exemption provision of § 8(e) by the Court below follows the Board's claim that the statute cannot be literally construed, and if that be the case, the loophole of the *Sand Door* case\* has not been closed as the Landrum-Griffin amendments intended.

The fact that there was no active labor dispute with Thorpe and Techalloy has no bearing upon the determination of the question here, nor does it make the secondary boycott of the products of those firms primary activity. *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951). For if "an object" of the refusal to handle is unlawful, the other considerations become immaterial. See also *National Woodwork Manufacturers Association v. NLRB*, *supra*, and *NLRB v. Washington-Oregon Shingle Weavers' District Council*, 211 F. 2d 149 (9th Cir. 1954).

We submit that this Court should grant the writ to resolve whether the interpretation of the Court below was in accord with the plain, unambiguous intent expressed in Section 8(e) of the statute.

\* *Local 1976, United Brotherhood of Carpenters and Joiners of America v. National Labor Relations Board*, 357 U.S. 93 (1958).

**3. The Decision Below Misconstrues This Court's Decision in *Universal Camera Corp. v. N.L.R.B.* so as to Nullify and Conflict with This Court's Decision in *N.L.R.B. v. Denver Building and Construction Trades Council*.**

The decision in *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675, 689 (1951), states the settled rule that where one of the several objects of a strike is illegal, the strike is tainted by this unlawful object and is unlawful. This is true even though the strike may have had a number of legal purposes. Union Vice President Baker unequivocally admitted that one object of the strike was to achieve an unlawful boycott of the goods and products of Thorpe and Techalloy where he said that the Union had instructed its members not to use the products of Thorpe and Techalloy under all circumstances because there was no contract with them. (R. 78-79).

The Court below misapplied this Court's decision in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1950), and disregarded Union Vice President Baker's statement of the illegal purpose on the ground that it could not disturb the Board's choice between two fairly conflicting views, even though the Court said:

"This testimony does indicate that Baker at least may have believed that 'an object' of the refusals to handle and apply was to force Johns-Manville and Armstrong to cease doing business with Thorpe and Techalloy." (R. 330)

There is obviously no conflict here. A strike can have both a lawful purpose and an unlawful purpose. An executive of the Union has admitted that one of the purposes of the strike was an unlawful attempt to achieve a secondary



boycott. As this Court stated in *Denver Building Trades Council*:

“\* \* \* it is not necessary to find that the sole object of the strike was that of forcing the contractor to terminate the subcontractor's contract.”

Thus, the Court below ignored an admitted illegal object of the strike and looked merely to what it found to be the lawful object of the strike. (R. 334) Under *Denver Building Trades Council*, it has no right to do so. The fact that other objects are preventing a violation of the contract, whether lawful or not, for objects of the refusal to handle as well, does not permit the Court below to ignore the substantial evidence that “an object” of the Union's activity was plainly proscribed as a secondary boycott of the products of non-union employers by the provisions of §§ 8(b)(4)(i) and (ii)(B) of the Act. *N.L.R.B. v. Milk Drivers and Dairy Employees Local Union 584, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 341 F. 2d 29 (2nd Cir. 1965).

We submit this Court should grant review to correct the manifest error of the lower court under the settled rule in such cases.

The questions presented in this case are of great and reoccurring significance in the administration of the National Labor Relations Act, especially in the building and construction industry. The resolution of the problems stated above will promote industrial peace in many cases.

**CONCLUSION**

For the reasons stated above, it is respectfully submitted that this petition for writ of certiorari be granted.

Respectfully submitted,

W. D. DEAKINS, JR.  
2013 First City National Bank  
Building  
Houston, Texas 77002

*Counsel for Petitioner*

*Of Counsel:*

VINSON, ELKINS, WEEMS & SEARLS  
2100 First City National Bank Bldg.  
Houston, Texas 77002

June 3, 1966

**APPENDIX A**

The relevant provisions of the National Relations Act, as amended, 61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*, are as follows:

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents —

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e); (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; \* \* \*

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer

ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alternation, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

**APPENDIX B**

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**No. 21910**

**HOUSTON INSULATION CONTRACTORS ASSOCIATION,**  
*Petitioner,*

**v.**

**NATIONAL LABOR RELATIONS BOARD,**  
*Respondent.*

**On Petitioner's Motion for Stay and Restraining Order.**

**(December 8, 1964.)**

Before RIVES, BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge: Petitioner (Houston Insulation) in connection with its Petition for Review, moves for an order staying the decision and order of the Board, dated September 4, 1964, and for a restraining order against the Union (International Ass'n of Heat and Frost Insulators, and Locals 22 and 113 thereof) pending a determination of the issues involved in a full dress review by this Court. We have concluded that the stay should be granted and that the motion for the restraining order should be denied.

Petitioner charged the Union with engaging in a secondary boycott in violation of § 8(b)(4)(i) and (ii)(B). At the behest of the Board's Regional Director acting under § 10(1) (which empowers him to seek appropriate injunctive relief), Judge Ingraham of the Southern District of Texas, after conducting a full hearing, found and concluded that there was reasonable cause to believe that



the Union was engaging in unlawful conduct. Accordingly, the Union Respondents were enjoined from refusing to handle materials for nonunion contractors on jobs being performed by members of the Petitioner-Association, pending a Board determination (see note 3, *infra*). The Trial Examiner agreed with the Regional Director and the District Court finding the two Locals — but not the International — guilty of an unlawful secondary boycott and recommended that a cease and desist order be issued. The Board however — apparently as a matter of law, not one of credibility choices — took the view that the Union had engaged only in protected primary activity and ordered the complaint dismissed. The Petitioner thereupon instituted this proceeding seeking reversal of this decision. In the course of this motion for interim relief, the General Counsel has expressed the purpose of seeking formal dissolution of the District Court temporary injunction.

Setting forth a persuasive showing of a substantial basis for its legal contentions as they bear on the likelihood of ultimate success in this Court on the legal issue of the propriety of the Board's order and a convincing demonstration of irreparable harm in the meantime if the Union is allowed to resume the complained of activity, Petitioner asks that the Board's order be stayed, and an injunction pending appeal be entered.

Under the Act there can be no real question about the power of this Court to stay an order of the Board. The procedures governing a Board petition for enforcement to a Court of Appeals are set out in § 10(e). The parallel section, 10(f), grants to "any person aggrieved by a final order of the Board" the right to petition for review in a Court of Appeals. Recognition of the Court's power to enter a stay order in a proceeding of either kind is then expressly made in § 10(g):

"(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, *unless specifically ordered by the court*, operate as a stay of the Board's order." (Emphasis supplied)

Actually no serious contest seems to be made by the Board on the issuance of a stay. The Board has, rather, focused its attention primarily on the asserted lack of jurisdiction in this Court to enter a restraining order at the instance of a private party.<sup>1</sup> The Court's power to enter a stay being clear under the Act,<sup>2</sup> the only question is whether this is an appropriate case for an exercise of that power.

After a thorough examination of the papers filed by all parties, a consideration of the proceedings in the District Court and those before the Trial Examiner and Board, we have concluded, without intimating how the issues should be resolved by a panel of this Court, that there is sufficient

<sup>1</sup> Without now undertaking to determine whether, as urged by the Board's brief, these wide grants of power necessarily confine interim relief to that sought by the Board, not a private party, it is evident that the following from §§ 10(e) and (f) go a long way to reinforce the power to grant a stay implied in § 10(g).

"(e) \* \* \* Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper \* \* \*"

"(f) \* \* \* Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper \* \* \*"

Likewise § 10(h) reflects the policy that when courts under this structure are given power to issue restraining orders, etc., the Norris-LaGuardia Act, 29 USCA §§ 101 et seq, is not to be a bar.

<sup>2</sup> It is unnecessary to consider whether, apart from the Act, the Court has an inherent power to enter a stay. Cf. 28 USCA § 1651.

merit to Petitioner's position to justify preserving the status quo until the case is finally disposed of in this Court. Were Petitioner to ultimately prevail, the beneficial effect of our decision would largely be vitiated, if while awaiting hearing and disposition, the Union were permitted to resume its activities.

The effect of the stay is such that it is not necessary for this Court — assuming, but not deciding, that it has the power — to issue an injunction in order to preserve the status quo. While it is true that ordinarily a § 10(1) injunction expires upon final adjudication by the Board, our staying the Board's order effectually postpones its operative legal effect until enforced by this Court. Therefore Judge Ingraham's order granting a temporary injunction which was to run "pending the final disposition of the matters involved,"<sup>3</sup> and which the records of the District Clerk show to be subsisting, remains in full force and effect so long as our stay continues. No further relief is needed or appropriate.

Accordingly, a stay will be entered as of the date of the application. STAY GRANTED.

RIVES, Circuit Judge, Dissenting:

The majority makes clear that the so-called "stay" which it grants is intended to have the force and effect of an injunction.<sup>1</sup> I must respectfully dissent because that seems to me beyond the jurisdiction of this Court.

---

<sup>3</sup> We do not read this language as going beyond the permissible scope of an injunction under § 10(1) — "appropriate injunctive relief pending the final adjudication by the Board."

<sup>1</sup> See the concluding two paragraphs of Judge Brown's opinion.

The Norris-LaGuardia Act<sup>2</sup> deprives the courts of the United States of jurisdiction to issue any restraining order or temporary or permanent injunction in a case such as this involving or growing out of a labor dispute, unless that jurisdiction has been subsequently conferred by the Labor Management Relations Act. See *Sinclair Refining Co. v. Atkinson*, 1962, 370 U.S. 195, 203. When granting appropriate relief provided in section 10 of the latter Act, it is expressly provided that "... the jurisdiction of courts sitting in equity shall not be limited by sections 101-110 and 113-115 of this title." 29 U.S.C.A. 160(h). However, as the Supreme Court observed in *Sinclair Refining Co. v. Atkinson*, *supra*, that Act permits "injunctions to be obtained, not by private litigants, but only at the instance of the National Labor Relations Board . . . ." (370 U.S. at 204.)<sup>3</sup> See also *Amazon Cotton Mill Co. v. Textile Workers Union*, 4 Cir. 1948, 167 F.2d 183, 186, 187. Indeed, Congress expressly rejected a provision in section 12 of the House bill "for injunctions at the request of private persons, rather than by the Board, in cases like these."<sup>4</sup>

---

<sup>2</sup> The opening section of that Act reads:

"No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter." 29 U.S.C.A. § 101.

<sup>3</sup> The only exception is a section not applicable to this case, 29 U.S.C.A. § 186(e), which the Court commented "stands alone in expressly permitting suits for injunctions previously proscribed by the Norris-LaGuardia Act to be brought in the federal courts by private litigants under the Taft-Hartley Act . . ." (370 U.S. 205, n. 19.)

<sup>4</sup> House Conference Report No. 510, June 3, 1947, on H.R. 3020, U.S. Code Cong. Serv., 80th Cong., 1st Sess. 1947, p. 1164.



Of the sections relied on by the majority (its footnote 1), section 10(e) relates to petitions by the Board for enforcement of its order and section 10(f) provides for the grant of temporary relief to the Board but not to a private litigant. See 29 U.S.C.A. § 160(e) and (f).

Jurisdiction to issue injunctive relief in a case of this kind, even on the Board's petition, is strictly limited to the period "pending the final adjudication of the Board with respect to such matter." Section 10(l) of the Act, 29 U.S.C.A. § 160(l). By its own terms the injunction expired on September 9, 1964, when the Board issued its decision and order dismissing the complaint.<sup>5</sup> It seems clear to me that this Court has no jurisdiction to grant the private petitioner's motion for stay and thereby to reinstate the injunction or continue it in force.

I therefore respectfully dissent.

---

<sup>5</sup> "The final adjudication of the Board" is more limited than "the final disposition of the matters involved," the language of the district court upon which the majority seizes (its footnote 3) to stretch the terms of the injunction. Any such broadening or extension of the statutory language would have far-reaching effects not intended by Congress.



**APPENDIX C**

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**No. 21910**

**HOUSTON INSULATION CONTRACTORS ASSOCIATION,**  
*Petitioner,*

**v.**

**NATIONAL LABOR RELATIONS BOARD,**  
*Respondent.*

**Petition for Review of an Order of the National Labor  
Relations Board Sitting at Washington, D. C.**

**(March 9, 1966.)**

**Before WOODBURY,\* WISDOM and BELL,  
Circuit Judges.**

WOODBURY, Senior Circuit Judge: This is a petition to review and set aside an order of the National Labor Relations Board dismissing a complaint issued upon charges filed in an association of contractors against two local unions and their parent union.

The petitioner, Houston Insulation Contractors Association, Contractors Association or simply Association, hereinafter, consists of a group of contracting companies in the Houston area banded together for the purpose, *inter alia*, of negotiating and administering collective bargaining agreements with Local 22 of the International Association of Heat and Frost Insulators and Asbestos Workers, AFL-

\* Senior Judge of the First Circuit sitting by designation.

CIO. Article VI of the collective bargaining agreement in force between these parties at the time involved provided in material part: "The Employer agrees that he will not sublet or contract out any work described in Article XIII," which included "preparation" and "application" of coverings for the insulation of hot and cold surfaces such as pipes, boilers, tanks etc.

Johns-Manville Sales Corporation is a member of the Contractors Association. In 1963 it was engaged in applying insulation to pipe at a construction project at Texas City, Texas, within the territorial jurisdiction of Local 22. In order to secure the insulation to the pipe Johns-Manville's employees cut coils of stainless steel sheets into strips or bands used to hold the insulation around the pipe. In June or July Johns-Manville purchased pre-cut stainless steel bands from Techalloy Company, Inc., a non-union producer of metal products. Johns-Manville employees at the direction of their union officers refused to apply the pre-cut bands.

Armstrong Contracting and Supply Corporation is another member of the Contractors Association. In 1963 it was engaged in applying asbestos insulation to pipes at a construction project in Victoria, Texas, which is not within the territorial jurisdiction of Local 22, but of Local 113 of the International Union. For several years Armstrong had purchased straight lengths of premoulded asbestos insulation from Thorpe Products Company, a non-union firm, which Armstrong's union employees had mitered, that is to say, cut at angles with a saw and glued the cut sections together so that the straight-length material could be used to cover curves or angles in pipe. Originally mitering had been done on the job with hand tools. At the time involved, however, and apparently for several years before, mitering had been done in Armstrong's shop

in Houston by its employee-members of Local 22 using power tools inconvenient to move and the mitered fittings delivered to the jobsite. In the summer of 1963 Armstrong purchased pre-mitered fittings from non-union Thorpe Products Company. Armstrong's employees on the Victoria job, members of Local 113, at their union officers' direction refused to apply these pre-mitered fittings.

The Contractors Association filed charges against the International Union and its Locals 22 and 113 on which general counsel for the Board issued a complaint charging that the refusals to apply the goods of Thorpe and Techalloy constituted an unlawful secondary boycott within the meaning of § 8(b)(4)(i) and (ii) (B) of the National Labor Relations Act as it now stands amended, 29 U.S.C. § 158(b)(4)(i) and (ii)(B),<sup>1</sup> asserting that at least "an object" of the refusal to apply, which admittedly amounts to coercion, was to require Johns-Manville and Armstrong to cease doing business with Thorpe and Techalloy. The International Union and the Locals denied that the refusals to use and apply the products of Thorpe and Tech-

<sup>1</sup> "It shall be an unfair labor practice for a labor organization or its agents —

• • • • •

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . to engage in, a strike or refusal in the course of his employment to use, . . . process, . . . or otherwise handle or work on any goods, articles, materials, or commodities . . . or (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where in either case an object thereof is . . .

• • • • •

"(B) forcing or requiring any person to cease using, . . . handling, . . . or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . ."

alloy constituted a secondary boycott. They asserted that the refusals were protected primary activity because the sole object thereof was to preserve work their members were entitled to perform by virtue of the ban on subcontracting in the collective bargaining agreement.<sup>2</sup>

After hearing, the trial examiner found that "this was not a boycott of nonunion products." And he ruled that "Article VI and XIII of the agreement with the Contractors Association are lawful." Nevertheless he concluded that the refusal to handle Thorpe and Techalloy products was unlawful wherefore he recommended a cease and desist order against the local unions but not against the International Union saying that the dispute was a local one and that he had "no evidence that the International directed it or intervened in it."

The trial examiner rested his conclusion of unlawful activity by the local unions on § 8(e) of the Act, 29 U.S.C. § 158(e), quoted in material part in the margin.<sup>3</sup> He said

<sup>2</sup> In the contract between Local 22 and the Contractors Association the employers agreed that in their operations outside the chartered territory of Local 22 they would abide by the rates of pay, rules and working conditions established by collective bargaining contracts between local insulation contractors and the local union in that territory. Local 113's contract with employers operating within its territorial jurisdiction where the work stoppage involving Armstrong's employees occurred contains a ban against subcontracting similar to the one in the contract between the Contractors Association and Local 22.

<sup>3</sup> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, . . . whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, . . . or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract . . . containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, . . ."



that the agreement between the Contractors Association and Local 22 was "clearly a contract aimed at the exemption of Section 8(e)". But he said that the exemption did not apply because the evidence was clear that mitering and cutting bands, even when performed by Armstrong and Johns-Manville employees, was performed at their shops and not at the jobsite. In addition he ruled that, even if the workers were entitled to preserve the work of mitering and cutting bands by the contract, they were not entitled under the rule of the so-called *Sand Door* case, *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958), to resort to economic coercion to enforce the contract.

The three-member panel to which the Board delegated its powers pursuant to §3(b) of the Act disagreed with the trial examiner and ordered the complaint dismissed in its entirety. Without discussing the impact of §8(e) of the Act, although that section provided the basis for the trial examiner's decision, the panel held that the activities of the two local unions were primary because "the object" thereof was to enforce the ban on subcontracting work properly claimed by the employees under the collective bargaining agreement the lawfulness of which it said appeared to be conceded. On the basis of its conclusion of no unlawful activity by the local unions, it dismissed the complaint as to the International Union.

One member of the panel dissented from the order insofar as it dismissed the charge against Local 113. The majority of the panel pointed out that although Local 113 had no contract with the Contractors Association, nevertheless the Association had agreed with Local 22 that its member companies when operating outside the territorial jurisdiction of that union would "abide by the rates of pay, rules and working conditions established by collective bar-



gaining agreements between the Local (sic) insulation contractors and the local union in that jurisdiction" and that Local 113's contract in its jurisdiction contained a ban on subcontracting identical with that in Local 22's contract with the Association. Wherefore the majority held that whether Local 113 be "regarded as a third-party beneficiary of Local 22's bargaining contract or as agent of Local 22, it had the right to insist, in accordance with the terms of the contract, that Armstrong adhere to the lawful no-subcontracting clause." The dissenting member of the panel said that Local 113 was not a third-party beneficiary of Local 22's bargaining contract with Armstrong and that there was nothing to show that it was acting as agent for Local 22. He considered that since Local 113 had no agreement with the Contractors Association, its attempt to enforce the contract for the benefit of Local 22 constituted unlawful secondary activity.

The petitioner insists in this court that both the facts and the law require the Board to find that all three unions had violated § 8(b)(4)(i) and (ii) (B) of the Act.

On the facts, the petitioner contends that the record conclusively shows that "an object" of the refusals to apply was to force Johns-Manville and Armstrong to cease doing business with Techalloy and Thorpe. In support of this contention it would have us give conclusive effect to the testimony of one Brooks Baker, an officer of Local 22 and a vice-president of the International Union, who at one point testified that he had instructed the men not to handle the products of Thorpe and Techalloy because "we are not in agreement with Thorpe or Techalloy." This testimony does indicate that Baker at least may have believed that "an object" of the refusals to handle and apply was to force Johns-Manville and Armstrong to cease doing business with Thorpe and Techalloy. But the Board

was not required as a matter of law to accept Baker's statement as gospel in the face of ample testimony, including later testimony of Baker himself, to the effect that the unions' objective was work preservation and in the face of the undisputed testimony that although Thorpe and Techalloy were non-union employers, neither local union had ever protested the use or application of any of their other products purchased by Johns-Manville or Armstrong but only protested the pre-cut bands and pre-mitered fittings. It may well be that the union officials hoped and expected, certainly we may assume that they would not have minded, if a result of their members' refusal to use and apply the bands and fittings was to put pressure on Techalloy and Thorpe as non-union employers. But hopes and expectations do not necessarily constitute "objects." An illegal "object" is something more than a result, even an inevitable result, of a work stoppage for a legitimate reason. Otherwise the right to strike would for practical purposes be nullified, a result which Congress clearly did not intend. See *Retail Clerks Union Local 770 v. NLRB*, 296 F. 2d 368, 373 (C.A.D.C. 1961). The distinction to be drawn as best one can is between an object and a consequence. See *Local 761, International Union of Electrical Workers v. NLRB*, 366 U.S. 667, 672 *et seq.* (1961).

The petitioner also would have us find conclusive evidence of an unlawful union object in its use of gummed labels or decals. These were supplied by the International Union to employers under contract with its locals and were applied by the union workers to the goods they made. The decals bore serial numbers by which the employer could be identified. When Johns-Manville and Armstrong employees received the Techalloy bands and Thorpe mitered fittings without decals they refused to apply them.

The use of decals is in itself a neutral fact. The decals could be used as a means of boycotting non-union goods or they could be used as a means of policing the ban on subcontracting. There is ample testimony in the record to support the conclusion that in this case the decals were used to police the ban on subcontracting. Moreover, there is undisputed testimony that other products of Thorpe and Techalloy purchased by Armstrong and Johns-Manville, which of course did not bear union decals, were not boycotted, and there is testimony that certain products made by union members and labeled as such were not applied when the serial numbers on the decals indicated that the products were not fabricated by employees entitled to the work under the contract.

Finally the petitioner relies on four other cases involving the same International Union and various of its locals as establishing an illegal pattern of union conduct. Apart from the broad proposition that past misconduct is not conclusive evidence of present guilt, the cases relied upon are clearly distinguishable. Three of them, *International Association etc. and Local 24 (Speed-Line Mfg Co., Inc.)*, 137 NLRB 1410 (1962); *International Association etc. and Local 125 (Insul-Caustic Corp.)*, 139 NLRB 659 (1962), and *International Association and Local 2 (Speed-Line Mfg Co., Inc., and Fibrous Glass Products, Inc.)*, 139 NLRB, 688 (1962), involved "premolded" fittings, not "prefabricated" ones as in the case at bar. The distinction, as the Board pointed out, is crucial, for prefabricated fittings are essentially hand made and could and customarily had been prepared by members of International's local unions, whereas premolded fittings are factory made with the use of heat and heavy machinery to produce curved or "L" shaped insulation. Neither Thorpe nor Armstrong makes or has the facilities to make premolded fittings. Nor do the

members of the locals have the skills to make such fittings. Thus in the cases cited above the Board quite reasonably concluded that in objecting to the use of premolded fittings the unions were not in fact seeking to obtain work claimable under their contracts but instead were objecting to the non-union status of the manufacturers of the premolded fittings.

The fourth case relied upon by the petitioner was decided by the Board subsequent to the case at bar and involved the same parties. *Local 22 International Association etc. and Houston Insulation Contractors Association (Mundet Cork Co.)*, 150 NLRB 156 (1965). In that case members of Local 22 employed by Mundet Cork Co. refused to apply aluminum jacketing supplied Johns-Manville ostensibly because it did not bear the union decal although in fact it had been made by union labor. The case is a peculiar one but it is readily distinguishable on the trial examiner's finding that the particular aluminum jacketing made by Johns-Manville had never been made and could not have been made by the Mundet employees and hence was not work within the contractual ban on subcontracting.

On the law, the petitioner relies primarily upon § 8(e) of the Act quoted in material part in footnote 3, *supra*. It asserts and we agree that the proviso exempting subcontracting jobsite work in the construction industry does not apply because the Board did not disturb the trial examiner's finding that the mitering and cutting of bands, even when performed by Armstrong and Johns-Manville employees, was performed in their shops and not at the jobsite. But we do not agree with the petitioner that § 8(e) absent its proviso renders the contractual ban on subcontracting unenforceable and void.



It is, of course, true that the agreement not to subcontract the work of preparation or application of insulation materials is in a certain sense an agreement whereby the employer agrees to refrain from handling, using or otherwise dealing in the products of another employer, if not also an agreement not to do business with another person. But to hold that a provision in the collective bargaining agreement against subcontracting was void and unenforceable because of its secondary effects would not square with *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), in which the Court held that "contracting out" work previously performed by members of an existing bargaining unit was a statutory subject of collective bargaining under § 8(d) of the Act. Section 8(e) was aimed at so-called "hot cargo" agreements whereby a union in effect forced employers to agree in advance not to do business with other employers with whom the union was not in agreement. It was not the congressional purpose to outlaw such traditional and typical activity as seeking to guarantee preservation of work traditionally done by a bargaining unit. *NLRB v. Joint Council of Teamsters No. 38*, 338 F. 2d 23, 28 (C.A. 9, 1964), and cases cited. In short, § 8(e) applies only to those agreements which on their face require an employer to cease or refrain from handling, using or otherwise dealing in the products of another employer with whom the union has a dispute. "Primary subcontracting claims, on the other hand, fall outside the ambit of § 8(e) . . . ." *Orange Belt District Council of Painters, No. 48 v. NLRB*, 328 F. 2d 534, 537, 538 (C.A.D.C. 1964). An agreement banning the subcontracting of preparation work such as the one in the case at bar, not being a "hot cargo" agreement or on its face an attempt at a secondary boycott *in futuro*, § 8(e) does not apply.



We agree with the Board's dismissal of the complaint as to Local 22. We do not, however, agree with its dismissal of the complaint as to Local 113.

The problem presented by the refusal of the members of Local 113 to apply the pre-mitered fittings is so far as we know unique. As we have already pointed out Local 113 had no contract with Armstrong, although the Contractors Association of which Armstrong was a member had a contract with Local 22 which provided that members when operating outside the Local's jurisdiction "abide by the rates of pay, rules and working conditions established by collective bargaining agreements between the Local (sic) insulation contractors and the local union in that jurisdiction" and Local 113's bargaining contract in its jurisdiction contained a ban on subcontracting identical with that in Local 22's contract with the Contractors Association. On this basis the Board held that "Whether Local 113 is regarded as a third-party beneficiary of Local 22's bargaining contract or as agent of Local 22 it had the right to insist, in accordance with the terms of the contract, that Armstrong adhere to the lawful no-subcontracting clause." We do not agree.

The record is clear, as the trial examiner found, that mitering fittings would not have been done by members of Local 113 at the jobsite in Victoria, Texas, but would have been done by members of Local 22 employed by Armstrong at its shop in Houston. Thus the third party beneficiary theory is inapplicable because Local 113 would not have reaped any benefit from Local 22's contract. The agency theory has no factual support in the record. Moreover, we think the question presented by the behavior of Local 113 is not to be framed in terms of principles of the law of contracts or agency, developed in other contexts for other purposes. The fact of the matter is that Local 113

put economic pressure on an employer with whom it had no collective bargaining agreement to secure benefits to employees in another unit, Local 22. The question is whether such action by Local 113 comports with the underlying purposes and objectives of the Act. We think it does not.

Since Local 113 was not attempting to procure work for its members (they would not have done the mitering anyway) if it was not attempting to force Armstrong to cease and refrain from doing business with Thorpe, it was engaging in a controversy not its own but in Local 22's controversy with Armstrong. No doubt Local 113 had an emotional interest in coming to the aid of its sister local. But it had no economic interest in Local 22's claim of breach of contract. We think an emotional interest is too weak to justify conduct which necessarily has coercive impact on a neutral employer. Even if, strictly speaking, Local 113 was not engaged in a secondary boycott, it was coercing Armstrong not for its own benefit but for the benefit of another local at the expense of a neutral employer. We think the thrust of the Act, particularly § 8(b)(4), as set out in many secondary boycott cases<sup>4</sup> is to require each union to restrict its economic coercion to its own labor disputes and not to use that weapon in aid of another union.

Since we are affirming the order of the Board in part and reversing it in part the basis for the Board's declining to pass on the involvement of the International Union, i.e., its finding that neither local had violated the Act, is destroyed. The case must go back to the Board for decision

---

<sup>4</sup> See *NLRB v. Denver Bldg. Council*, 341 U.S. 675, 692 (1951), in which the Court described the congressional objectives of the Act as "... of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.

of the question of the International Union's participation in Local 113's work stoppage.

*The Order of the Board is enforced in part and reversed in part, and the case is remanded to the Board for further proceedings consistent with this opinion.*

**APPENDIX D**

IN THE  
**UNITED STATES COURT OF APPEALS**  
**FOR THE FIFTH CIRCUIT**

**No. 21,910**

**HOUSTON INSULATION CONTRACTORS ASSOCIATION,**  
*Petitioner,*

**v.**

**NATIONAL LABOR RELATIONS BOARD,**  
*Respondent.*

**DECREE**

Before: Woodbury,\* Wisdom and Bell, Circuit Judges

BY THE COURT:

THIS CAUSE came on to be heard upon a petition of the Houston Insulation Contractors Association to review and set aside an order of the National Labor Relations Board issued on September 4, 1964, dismissing a complaint against International Association of Heat and Frost Insulators and its Locals 22 and 113. The Court heard argument of respective counsel on March 25, 1965, and has considered the briefs and transcript of record filed in this cause. On March 9, 1966, the Court, being fully advised in the premises handed down its opinion affirming the said order of the Board in part and reversing in part, and remanding the case to the Board for further proceedings consistent with its opinion. In conformity therewith it is hereby

ORDERED, ADJUDGED, AND DECREED by the United States Court of Appeals for the Fifth Circuit that that part of

Senior Judge of the First Circuit sitting by designation.

the Board's order dismissing a complaint against Local 22, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO be affirmed and that the part of the order dismissing the complaint against International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, and its Local 113, be reversed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the case be remanded to the Board for further proceedings consistent with the opinion of this Court.

ENTERED MAR 31 1966



**APPENDIX E**

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

Nos. 14904, 14988, 15064

SEPTEMBER TERM, 1965 — SEPTEMBER SESSION, 1965

**NATIONAL WOODWORK  
MANUFACTURERS ASS'N., et al.,  
*Petitioners,***

**No. 14904            vs.  
NATIONAL LABOR RELATIONS BOARD,  
*Respondent.***

**NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,***

**No. 14988            vs.  
METROPOLITAN DISTRICT COUNCIL  
OF PHILADELPHIA AND VICINITY OF  
THE UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS OF  
AMERICA, AFL-CIO,  
*Respondent.***

**METROPOLITAN DISTRICT COUNCIL  
OF PHILADELPHIA AND VICINITY OF  
THE UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS OF  
AMERICA, AFL-CIO,  
*Petitioner,***

**No. 15064            vs.  
NATIONAL LABOR RELATIONS BOARD,  
*Respondent.***

**On Petitions to Re-  
view, and Petition  
to Enforce, an Or-  
der of the National  
Labor Relations  
Board.**

**NOVEMBER 17, 1965**

Before HASTINGS, *Chief Judge*, and SCHNACKENBERG and KNOCH, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Petitioner, National Woodwork Manufacturers Association, on behalf of its members, Hardwood Products Corporation, a Wisconsin corporation, and Mohawk Flush Doors, Inc., an Indiana corporation, herein called "NWMA", "Hardwood", and "Mohawk", respectively, asks us in No. 14904 to review and modify an order of the National Labor Relations Board, herein called the "Board", issued on November 12, 1964, dismissing, in part, a complaint against Metropolitan District Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al., herein called the "Council" or the "Union".

In No. 14988, NWMA and Charles B. Mahin, an individual, made charges upon which the Board issued a complaint on August 27, 1963, and its amended complaint on October 4, 1963, alleging that respondent unions had engaged and were engaging in unfair labor practices in violation of section 8 (b) (4) (A), section 8 (b) (4) (B), and section 8 (e) of the Labor Management Relations Act of 1947, as amended, herein called the "Act", 29 U.S.C.A. § 158. In No. 14988, the Board seeks enforcement of its order entered against the Council and its affiliated local unions.

In No. 15064, the Council, Robert L. Gray and Charles L. Boyer, by their petition, seek an order setting aside the order of the Board to the extent that it finds against them and imposes sanctions on them.

Following a hearing before an examiner and the filing of his decision, the Board issued the aforesaid order of November 12, 1964, which dismissed all charges of violations except those with respect to the Union's conduct on three construction jobs described as (1) the Coatesville

Hospital job, at which L. F. Driscoll Company was general contractor; (2) the North Junior High School job, at which John J. McDonnell, Inc., was general contractor; and (3) the St Aloysius Academy job, at which Nason & Cullen, Inc., was general contractor; as to each of which the Board found violations of section 8 (b) (4) (B) but granted what NWMA considers only partial and inadequate relief.

Twenty-seven local carpenter unions in Philadelphia and in four other counties in Pennsylvania are affiliated with the Metropolitan District Council of Philadelphia and Vicinity. These locals are "serviced" by 11 business agents who work directly under Gray, the Council's secretary-treasurer and business manager. These business agents police the jobs and see that contracts are adhered to.

The Council engages in collective bargaining with individual employers and with the General Building Contractors' Association, Inc., (GBCA) which bargains on behalf of its employer members who build schools, hospitals, factories, and other structures in the Philadelphia area. The contracts in effect during the relevant period contain a provision similar to rule 17 of the Union's by-laws, which reads as follows:

Rule 17. No employee shall work on any job on which cabinet work, fixtures, millwork, sash, doors, trim or other detailed millwork is used unless the same is Union-made and bears the Union Label of the United Brotherhood of Carpenters and Joiners of America.<sup>[1]</sup>

*No member of this District Council will handle material coming from a mill where cutting out and fitting has been done for butts, locks, letter plates, or hardware of any description, nor any doors or transoms*

[1] The first sentence in Rule 17 concededly violates section 8(e) but no issue is presented here concerning that aspect of the case.

*which have been fitted prior to being furnished on job, including base, chair, rail, picture moulding, which has been previously fitted. This section to exempt partition work furnished in sections. (Emphasis added.)*

It is petitioner's contention in No. 14904 that the Union engaged in an unlawful product boycott of prefabricated doors in the Philadelphia area and enforced an illegal hot-cargo contract prohibiting the use of such prefabricated doors<sup>2</sup> throughout said area.

Prefabricated doors are doors which are machined, processed and finished in various ways at the plants where they are manufactured. There was testimony that the use of prefabricated doors saves time and money.

Petitioner cites, as a matter of common knowledge, that the use of prefabricated doors has been greatly increasing in the construction industry, which extends to numerous other parts of building, such as windows, factory-built trusses, wall and partition assemblies, prefinished paneling, prefabricated kitchens and bathrooms, and on up to the point of prefabricated houses and other buildings.

---

<sup>2</sup> (1) Prefitted doors which have been cut to exact size and beveled at the factory, so that they will fit into frame openings on the job without further machining.

(2) Precut doors which have been machined at the factory to receive hardware (locks, knobs, hinges, etc.), louvers, glass openings, and the like.

(3) Prefinished doors which have been preservative-treated, sealed, varnished, painted, or otherwise finished at the factory for ultimate use without further finishing. (Such doors must be completely machined before the final finish is affixed at the factory.)

(4) Armored doors which are completely machined at the factory and have plastic or other wear-resistant materials laminated to surfaces and edges.

(5) Prehung doors which are completely machined and assembled in door-frame units at the factory.

Prior to the present proceedings a letter was written in February, 1963, by Business Manager Gray of the Council to President Hutchinson of the United Brotherhood of Carpenters, stating that there was a serious problem of precut and prefitted doors coming into the Philadelphia area. Then followed a union drive to bar all prefabricated doors, which was implemented by the alleged boycotts and work stoppages that led to the NWMA charges against the Union and these proceedings.

• Typical of the operation of the Union drive in this respect was the Coatesville Hospital job in May 1963. Driscoll, the contractor, purchased through a Pennsylvania millwork distributor, prefabricated architectural doors made by Hardwood for this job. In accordance with the architect's common practice, the specifications called for precut, prefitted and prefinished doors. On May 23, the day after the doors were delivered to the job, Union agent Boyer called from the job and told vice-president Brown of Driscoll that the prefinished doors could not be hung, because it was "in violation of an agreement". When Brown asked "where do we go from here?", Boyer said that he did not know and that if the doors were hung anyhow, the job would be "struck". Boyer admitted that his word was not final and that Brown could take it up with Gray. Brown then called Gray and stated what had occurred, but Gray said that "no carpenters from now on will hang pre-finished or pre-fit doors." Brown asked what could be done, because the hospital was hoping to get into the building, and Gray said that was not his problem. Thereupon Driscoll's secretary telephoned Gray and asked for an explanation and was told that Driscoll was in violation of rule 17 because the doors had been factory precut, and that the carpenters were not allowed to hang them. From May 23, when the Union carpenters discovered the



doors on the job, until May 27, they refused to hang them. They were then hung after the contractor agreed to pay the carpenters for work which they did not perform.

Such a solution was not reached in the North Junior High School, St. Aloysius Academy or Frouge Corporation jobs, the first two of which are factually not different from the Coatesville Hospital job.

Frouge Corporation was the general contractor on a housing project in Philadelphia, for which it ordered factory-machined Mohawk doors. Neither job specifications nor Frouge's contract required that the doors be precut, pre-fitted, or premachined. When the second shipment thereof arrived, Union agents did not allow their men to work on them. They cited rule 17 which was then shown to and read by President Frouge and Project Manager Green. Frouge had Green order 665 Mohawk doors, which, when delivered, did not bear a union label. Union carpenters did the cutting on the replacement doors which were then installed on the job.

The Board held that the Union violated § 8 (b) (4) (i) (ii) (B), by reason of its boycott of prefabricated doors on the Coatesville, North Junior High and St. Aloysius jobs, but as to Frouge, it held otherwise, giving as its reason, that, while in the first three jobs the specifications called for prefabricated doors and hence the Union target was the doors and persons making and distributing them, in *Frouge* the Union boycotted prefabricated doors which had been purchased by the contractor — but which were *not required* by job specifications. This conclusion seems to indicate that the Board held that the Union's target in *Frouge* was not the prefabricated doors and their manufacturer but rather contractor Frouge and that the situation involved only a primary dispute with him. We agree.

Section 8 (b) (4) (i) (ii) (B) reads as follows:

(b) It shall be an unfair labor practice for a labor organization or its agents —

• • •

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is —

• • •

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, *any primary strike or primary picketing* [emphasis supplied] . . . .

We hold that Frouge was the object of a "primary strike or primary picketing" and therefore the Union was entitled to the protection of the proviso in § 8(b) (4) (B).

We now consider the objections of the Union to the Board's finding of violations of § 8 (b) (4) (B) as to the first three contractors above-named.

The language of the statute and its legislative history clearly indicate that § 8 (b) (4) (B) applies to the product boycott carried on by the Union in this case under its rule 17. In *Allen Bradley Co. v. United States*, 325 U.S. 797 (1945), it appeared that Local 3 of the Electrical Workers Union and the Electrical Contractors of New York City

had agreed on work rule restrictions, under which Local 3 refused to handle or install electrical fixtures and equipment made or assembled outside the New York City area. It was agreed that, in lieu of absolute prohibition, the union would dismantle and rebuild the "foreign" equipment or be paid the equivalent thereof. Local 3 had no active labor dispute with the "foreign" manufacturers, nor did it have any interest in the working conditions at such factories. It was not concerned with whether the "foreign" fixtures were union made — in fact, it barred fixtures made by its sister local union in New Jersey. Further, Local 3 was not concerned with whether the immediate contractor had or did not have "control of the work." Clearly, the union's ultimate objective was to preserve work for its members. The intermediate objective, as the means to its ultimate goal, was the boycott of foreign products. It was the inadequacy of antitrust remedies, demonstrated in *Allen Bradley, supra*, that led directly to the Taft-Hartley prohibition of secondary boycotts.<sup>3</sup>

Our own court in *Joliet Contractors Association v. National Labor Relations Board*, 202 F. 2d 606 (1953), cert. den. 346 U.S. 824, considered an area boycott similar to that in *Allen Bradley*. It was a typical product boycott case. There Glazier's Union Local 27 had a rule that preglazed window sashes could not be installed, and the union's bylaws and agreements with the contractor provided that all sash and glass work must be done on each respective job site or building. We rejected the argument there made that the union's dispute with the contractor was only primary and that its objective was preservation of work on the job, saying, at 610:

"\* \* \* the fact remains that the target was the use of preglazed sash, and any and all who handled, used

<sup>3</sup> Legislative History of the Labor Management Relations Act, 1947, pp. 1055-1056, 93 Cong. Rec. 4255.

or sold such sash were the intended and in many cases the actual victims of the Union's course. Moreover, we are not convinced that a Union violation of the provision under discussion is dependent upon whether its activities are primary or secondary. \* \* \*

In the case at bar the Union's target was and is prefabricated doors. Neither here nor in *Joliet Contractors* was there a labor dispute between the union and any manufacturer.<sup>4</sup> In *Joliet Contractors* we found the union's refusal to install such products to be a violation of § 8 (b) (4) (A).<sup>5</sup> At that time the proviso in § 8 (b) (4) (B) had not been enacted.

We find nothing to the contrary in *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO v. National Labor Relations Board, et al.*, 366 U.S. 667 (1961), relied on in the brief of the Union.

Our views find support in *National Labor Relations Board v. Local 11, United Brotherhood of Carpenters, etc.*, 6 Cir., 242 F. 2d 932 (1957) which involved § 8 (b) (4) (A)<sup>6</sup> of the Act. The Board there contended that the carpenters' union induced a concerted refusal by the employees of the subcontractors to handle prehung doors in a building project in Ohio, which doors had been manufactured in Indiana and Michigan and were sold as component parts of prefabricated home units to the general contractor in the Cleveland, Ohio area.

Judge Stewart (now Justice Stewart) said at 934:

"Substantially adopting the Trial Examiner's Intermediate Report, a majority of the Board found

<sup>4</sup> As in *Allen Bradley*, in the case at bar the Union was not concerned with whether the boycotted doors were union made.

<sup>5</sup> Now known as (B).

<sup>6</sup> Now known as (B).



the respondents had induced and encouraged employees of the subcontractors to engage in a concerted refusal to handle the prehung doors; and that objectives of the respondents' conduct were to force or require the subcontractors to cease using prehung doors, to force or require Erie Building Company to cease using and purchasing prehung doors, and to force or require *Scholz Homes, Inc., to cease doing business with the manufacturers of the doors.* (Italics supplied.)

. . .

"The fact that there was not an active labor dispute between the respondents and the producers of the doors would not serve to immunize the respondents from the terms of § 8(b) (4) (A) of the Act, which neither literally nor implicitly requires the existence of such a dispute as a condition of its operation. *N. R. L. B. [sic] v. Washington-Oregon Shingle Weavers' Dist. Council*, 9 Cir., 1954, 211 F. 2d 149, 152-153.

. . .

"This brings us to the respondents' primary defense. They say that even if they encouraged and induced a concerted work stoppage by employees with respect to the doors, this did not constitute an unfair labor practice within the meaning of § 8 (b) (4) (A) because the immediate employers (the subcontractors) had acquiesced in advance in the employees' action by virtue of a collective bargaining agreement containing a 'hot cargo' clause, and also by reason of the fact that the subcontractors themselves [sic] belonged to the union, and as union members were obligated not to use the prehung doors. Although the Board found upon conflicting evidence that no collective bargaining agreement containing a 'hot cargo' clause was then in effect, it is conceded that the subcontractors were members of the union and that they acquiesced in the conduct of their employees in not handling or working on the doors in question."



By an amendment enacted in 1959, subsection (e) was added to § 8 of the Act, 29 U.S.C.A. § 158, providing, in part:

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: \* \* \*

The distinction between job site work and factory-made products is recognized in the foregoing construction proviso of § 8 (e) itself. The legislative history shows that it was explained by Senator Kennedy that the "proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite."<sup>7</sup>

We hold that § 8 (e) unaffected by the proviso is controlling in this case.

For all of these reasons, that part of the Board's order entered November 12, 1964 dismissing, in part, the complaint against the Council is set aside and this cause is remanded to the Board with instructions to enter an order finding that the Council violated § 8 (b) (4) (i) (ii) (A) and § 8 (e) of the Act, as set forth herein, as well as § 8

<sup>7</sup> J.A. 135; II Leg. Hist., p. 1443.

(b) (4) (i) (ii) (B) to the extent found by the Board, which action we affirm.

The Board is directed to restrain any further such proscribed violations of the Act by the Council in the Philadelphia area.

IN PART AFFIRMED AND IN PART  
SET ASIDE AND REMANDED WITH  
DIRECTIONS.

A True Copy:

Teste:

.....  
*Clerk of the United States Court of  
Appeals for the Seventh Circuit.*

## INDEX

|                                     | Page |
|-------------------------------------|------|
| Opinions below .....                | 1    |
| Jurisdiction .....                  | 2    |
| Question presented .....            | 2    |
| Statute involved .....              | 2    |
| Statement .....                     | 3    |
| Reasons for granting the writ ..... | 6    |
| Conclusions .....                   | 10   |
| Appendix A .....                    | 11   |
| Appendix B .....                    | 25   |
| Appendix C .....                    | 27   |

## CITATIONS

### Cases:

|   |       |
|---|-------|
| <i>Houston Insulation Contractors Association v. National Labor Relations Board</i> , No. 206, this Term .....                                    | 7     |
| <i>Local 761, Electrical Workers v. National Labor Relations Board</i> , 366 U.S. 667 .....   | 7     |
| <i>Milwaukee Plywood Co. v. National Labor Relations Board</i> , 285 F. 2d 325 .....  | 9     |
| <i>National Labor Relations Board v. General Drivers, Local 968 (Otis Massey Co.)</i> , 225 F. 2d 205, certiorari denied, 350 U.S. 914 .....      | 9, 10 |
| <i>National Labor Relations Board v. National Woodwork Manufacturers Association</i> No. 111, this Term, certiorari granted, June 6, 1966 .....   | 6     |
| <i>National Woodwork Manufacturers Association v. National Labor Relations Board</i> , No. 110, this Term, certiorari granted, June 6, 1966 ..... | 6     |

### Statute:

|   |                |
|---|----------------|
| National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519 29 U.S.C. 151, <i>et seq.</i> ): |                |
| Section 7 .....   | 8, 27          |
| Section 8(b) (4) (B) .....  | 2, 6, 7, 8, 27 |
| Section 8(e) .....  | 2, 6, 28       |

**In the Supreme Court of the United States**

**OCTOBER TERM, 1966**

---

**No.**

**NATIONAL LABOR RELATIONS BOARD, PETITIONER**

**v.**

**HOUSTON INSULATION CONTRACTORS ASSOCIATION**

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT**

---

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in this case on March 9, 1966, insofar as it sets aside the Board's order.

**OPINIONS BELOW**

The opinion of the court of appeals (App. A, *infra*, pp. 11-23) is reported at 357 F. 2d 182. The Board's decision and order (R. 57-68)<sup>1</sup> are reported at 148 N.L.R.B. 866.

---

<sup>1</sup> References to the pleadings, decision and order of the Board, etc., printed as Volume I, Transcript of Record in the court below, are designated "R"; references to portions of the testimony and exhibits, printed as a joint appendix to the briefs of the parties in the court below, are designated "J.A."

## JURISDICTION

The judgment of the court of appeals was entered on March 9, 1966, and a decree was entered on March 31, 1966. (App. B, *infra*, pp. 25-26). On June 8, 1966, Mr. Justice Black extended the time for filing a petition for certiorari to and including August 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Finding that the purpose of a provision in a collective bargaining agreement forbidding the subcontracting of certain work was to preserve, for the employees in the bargaining unit covered by the agreement, work that had traditionally been performed by those employees, the court of appeals held that the provision was not unlawful under the "hot cargo" section of the National Labor Relations Act (Section 8(e)), and that a strike by the union that was a party to the agreement to enforce the provision did not violate the secondary boycott section (Section 8(b)(4)(B)). The question presented is whether a work stoppage by a union which is not a party to the agreement but represents other employees of the same employer, designed to help the union that is a party enforce its lawful work preservation clause, is a forbidden secondary boycott.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are printed in Appendix C, *infra*, pp. 27-29.



## STATEMENT

1. Houston Insulation Contractors Association consists of a group of contractors in the Houston area, who bargain on a joint basis and have a collective bargaining agreement with Local 22 of the International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO (R. 34; J.A. 31). Johns-Manville Sales Corporation and Armstrong Contracting and Supply Corporation are members of the Association and signatories to the agreement (R. 34; J.A. 31), which prohibits employer signatories from subcontracting certain work, including the "preparation" and "application" of coverings for the insulation of hot and cold surfaces such as pipes, lockers, and tanks (R. 59; 136, 142).

In July 1963, Johns-Manville, while engaged in applying insulation to pipes at a construction project in Texas City, Texas, purchased bands from Techalloy Company, Inc., which had been pre-cut by Techalloy's employees (R. 38; J.A. 12-13). Normally, the task of cutting the bands to specification is performed by Johns-Manville employees (R. 60; J.A. 63-64, 104-105).<sup>2</sup> At the direction of an official of Local 22, the Johns-Manville employees, who were members of that Local, refused to install the Techalloy bands (R. 62-63, 40-41; J.A. 80-81, 104-106).

In 1963, Armstrong was engaged in applying asbestos insulation to pipes at a construction project in

---

<sup>2</sup> These bands, in the manufactured state, are rolls or coils of steel. They are cut into strips, and then used in applying insulation material (R. 59-60; J.A. 105).

Victoria, Texas. It purchased straight lengths of asbestos material from Thorpe Products Company (R. 61; J.A. 39-44). These straight lengths were cut to make mitered fittings<sup>\*</sup> by Armstrong's employees in Houston, who were members of Local 22. The fittings were installed by Armstrong's employees at the job-site; these employees were members of Local 113, which had jurisdiction over Victoria. Cutting the straight lengths to size was work which Local 22 claimed by virtue of the no-subcontracting provisions of its collective bargaining agreement. (R. 82; J.A. 84-87.)<sup>\*</sup> On two occasions, Armstrong purchased from Thorpe fittings on which the mitering work claimed by Armstrong's employees had already been performed by Thorpe (R. 35; J.A. 6, 54-55). When these fittings arrived on the job-site without the identifying labels showing that the mitering had been done by Armstrong's Houston employees, Local 113 instructed Armstrong's employees on the job-site to re-

---

<sup>\*</sup> A mitered fitting is "an insulation item that is used to cover something other than a straight piece of pipe in a pipe line, and this is made by taking standard insulation pipe covering and cutting it on a bias or miter and then gluing it together or sticking it together so that it will conform to the fitting that you are trying to shape it to" (J.A. 5).

<sup>\*</sup> The contract between Local 22 and the Association also provided that members, when operating outside the Local's jurisdiction, should "abide by the rates of pay, rules and working conditions established by collective bargaining agreements between the [local] insulation contractors and the local union in that jurisdiction." Local 113's bargaining contract, in turn, contained a ban on subcontracting identical to that in Local 22's contract with the Association. (R. 62; J.A. 132-133.)

fuse to install these fittings (R. 62-63, n. 6, 35, 36; J.A. 53, 54).

2. The Board concluded that Locals 22 and 113 had refused to install the prefabricated Techalloy and Thorpe products, not because they were manufactured under non-union conditions, but because the use of those prefabricated products deprived Johns-Manville and Armstrong employees of work customarily done by them and which they claimed by virtue of the no-subcontracting provision in Local 22's contract with the Association. The Board held that the unions' inducement of work stoppages among the employees of Johns-Manville and Armstrong was thus lawful primary activity—not secondary activity proscribed by Section 8(b)(4)(B) of the Act—and dismissed the unfair labor practice complaint that the Board's General Counsel had issued against the unions. (R. 58-66.)

3. The court of appeals sustained the Board's dismissal of the complaint with regard to Local 22 (Pet. App. 9a-19a). However, it held that the Board had erred in dismissing the complaint as to Local 113. Since that union was neither a party to Local 22's contract nor attempting to procure work for its members, it had, in the view of the court, an insufficient interest to justify its work stoppage, which necessarily had an impact on the supplier of the prefabricated materials (Thorpe). The court remanded the case to the Board for the entry of an appropriate order against Local 113, and for consideration of the question whether the international union had participated in Local 113's work stoppage. (App. A, *infra*, pp. 19a-21a.)

## REASONS FOR GRANTING THE WRIT

This is a companion case to *National Labor Relations Board v. National Woodwork Manufacturers Association*, and *National Woodwork Manufacturers Association v. National Labor Relations Board*, Nos. 111 and 110, this Term, certiorari granted, June 6, 1966. No. 111 presents the question whether a clause forbidding the employer to use certain prefabricated materials, though designed merely to preserve work for the employees of that employer, violates the hot cargo provision (Section 8(e)) of the National Labor Relations Act. No. 110 presents the question whether a work stoppage instituted to enforce such a clause violates Section 8(b)(4)(B), the secondary boycott provision of the Act. The present case involves the related question whether such a work stoppage violates Section 8(b)(4)(B) merely because it is brought, not by the union that is the actual signatory to the agreement containing the clause, but by another union representing other employees of the same employer. We submit that the answer is clearly "no", and that this Court should review the question in view of its close relation to those involved in the *National Woodwork* cases that the Court has decided to hear this Term.

1. Section 8(b)(4)(B) of the National Labor Relations Act (App. C, *infra*, pp. 27-28) bars a union from using strikes or related measures against a neutral, "secondary" employer for the purpose of forcing him to cease doing business with the employer with whom the union has a dispute. A proviso to that



section expressly permits "any primary strike or primary picketing." Assuming—as the court below found<sup>5</sup>—that the no-subcontracting clause in Local 22's contract with the Association had the lawful, primary objective of preserving work for Armstrong's employees represented by Local 22, a work stoppage by those employees, in the event Armstrong violated the agreement, would not, in the circumstances here, violate Section 8(b)(4)(B). Yet at the same time the court below has held that a work stoppage by another union (Local 113) representing other Armstrong employees, though intended only to secure enforcement of their fellow employees' lawful contract provision, was secondary and so violated the statute.

The court reasoned that, since Local 113 was not seeking to obtain work for the employees it represented, and was not a party to Armstrong's contract with Local 22, its interest was "too weak" to privilege its work stoppage, which necessarily had an impact on the employer from whom Armstrong purchased the prefabricated materials. However, if Local 113 was engaged in legitimate primary activity, it is irrelevant that an incidental effect of that activity may have been to put pressure on Armstrong to cease doing business with Thorpe (see *Local 761, Electrical Workers v. National Labor Relations Board*, 366 U.S. 667, 673-674); and, on the critical issue whether the activity

---

<sup>5</sup> This finding is challenged in the petition of the employers' association, *Houston Insulation Contractors Association v. National Labor Relations Board*, No. 206, this Term, which the Board is not opposing.



was primary or secondary, the fact that Local 113 neither was seeking work for its own members nor was a party to Local 22's contract is not dispositive.

The correct test, we submit, is whether the stoppage was directed at the employer with whom Local 113 had a dispute or whether its real object was to conscript that employer in a campaign directed at a third party. Plainly, it was the former. There was no dispute with the third party, Thorpe, the supplier of the prefabricated materials, although Thorpe may incidentally have been affected. The dispute was with Armstrong, and Local 113 limited its strike activity to Armstrong's employees at their work site. Indeed, in view of the common economic interests among all employees working for the same employer, Local 113's work stoppage was a classic instance of "concerted activities for \* \* \* mutual aid or protection," which are protected by Section 7 of the National Labor Relations Act (App. C, *infra*, p. 27).

Section 8(b)(4)(B) is directed at the situation where one union strikes an employer in order to put pressure on another employer—not the converse situation where two unions have a dispute with a single employer and seek to exert pressure on that, and no other, employer. We urge here, as we did in the petition for certiorari in No. 111, this Term (see p. 6, *supra*), that the secondary boycott, and related hot cargo, provisions of the Act apply only where the work stoppage or contract provision is not aimed at the employer of the employees immediately involved, but at some other employer, in whose dispute with the union the first employer—though he takes the

brunt of the union's pressure—is really a neutral. Here, there is no question but that the dispute was with the contractor rather than with the employer who furnished the prefabricated materials, and that the work stoppage was brought by employees of the contractor to place pressure on him, and no one else. Whether or not these employees were as directly aggrieved as those who were direct beneficiaries of the work-preservation clause in question, there was no secondary objective. That (in our view) is dispositive.

2. The decision of the court below with regard to Local 113 is in conflict with the decision of the Seventh Circuit in *Milwaukee Plywood Co. v. National Labor Relations Board*, 285 F. 2d 325. There, one union represented the employees of a parent company and in furtherance of a dispute with that company picketed a subsidiary located in another city. The relationship between the two companies was sufficiently close to make them one employer. A second union, representing the employees of truckers making deliveries to the subsidiary, joined the picket line and induced a stoppage of deliveries. The Seventh Circuit upheld the Board's finding that the second union, by thus aiding the first, had not exceeded the bounds of lawful primary activity. The decision below also conflicts with the previous decision of the Fifth Circuit in *National Labor Relations Board v. General Drivers, Local 968 (Otis Massey Co.)*, 225 F. 2d 205, certiorari denied, 350 U.S. 914.<sup>6</sup>

---

<sup>6</sup> There the court held that the union representing Otis Massey's warehousemen and truck drivers had not exceeded the bounds of legitimate primary activity when, in further-

**CONCLUSION**

The decision below, insofar as it sets aside the Board's order, is clearly incorrect and in conflict with the holding of another circuit. The issue involved is closely related to issues that will be before the Court in cases to be argued this Term. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

**THURGOOD MARSHALL,**  
*Solicitor General.*

**ARNOLD ORDMAN,**  
*General Counsel,*

**DOMINICK L. MANOLI,**  
*Associate General Counsel,*

**NORTON J. COME,**  
*Assistant General Counsel,*  
*National Labor Relations Board.*

**AUGUST 1966..**

---

ance of a dispute with Otis Massey involving the latter's employees, it picketed the project where Otis Massey's construction employees, who were represented by other unions, were at work. The court emphasized that a contrary ruling would isolate "other employees of that same primary employer from exercising their statutory right under Section 7 \* \* \* to engage in mutual aid and protection and make common cause with their co-workers." 225 F.2d at 210.

APPENDIX A

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 21910

---

HOUSTON INSULATION CONTRACTORS ASSOCIATION,  
PETITIONER

*versus*

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

---

Petition for Review of an Order of the National  
Labor Relations Board Sitting at Washington, D. C.

---

(March 9, 1966.)

---

Before WOODBURY,\* WISDOM and BELL, Circuit  
Judges.

WOODBURY, Senior Circuit Judge: This is a petition to review and set aside an order of the National Labor Relations Board dismissing a complaint issued upon charges filed in an association of contractors against two local unions and their parent union.

The petitioner, Houston Insulation Contractors Association, Contractors Association or simply Associa-

---

\* Senior Judge of the First Circuit sitting by designation.

tion, hereinafter, consists of a group of contracting companies in the Houston area banded together for the purpose, *inter alia*, of negotiating and administering collective bargaining agreements with Local 22 of the International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO. Article VI of the collective bargaining agreement in force between these parties at the time involved provided in material part: "The Employer agrees that he will not sublet or contract out any work described in Article XIII," which included "preparation" and "application" of coverings for the insulation of hot and cold surfaces such as pipes, boilers, tanks etc.

Johns-Manville Sales Corporation is a member of the Contractors Association. In 1963 it was engaged in applying insulation to pipe at a construction project at Texas City, Texas, within the territorial jurisdiction of Local 22. In order to secure the insulation of the pipe Johns-Manville's employees cut coils of stainless steel sheets into strips or bands used to hold the insulation around the pipe. In June or July Johns-Manville purchased pre-cut stainless steel bands from Techalloy Company, Inc., a non-union producer of metal products. Johns-Manville employees at the direction of their union officers refused to apply the pre-cut bands.

Armstrong Contracting and Supply Corporation is another member of the Contractors Association. In 1963 it was engaged in applying asbestos insulation to pipes at a construction project in Victoria, Texas, which is not within the territorial jurisdiction of Local 22, but of Local 113 of the International Union. For several years Armstrong had purchased straight lengths of premolded asbestos insulation from Thorpe Products Company, a non-union firm, which Armstrong's union employees had mitered, that is to say,



cut at angles with a saw and glued the cut sections together so that the straight-length material could be used to cover curves or angles in pipe. Originally mitering had been done on the job with hand tools. At the time involved, however, and apparently for several years before, mitering had been done in Armstrong's shop in Houston by its employee-members of Local 22 using power tools inconvenient to move and the mitered fittings delivered to the jobsite. In the summer of 1963 Armstrong purchased pre-mitered fittings from non-union Thorpe Products Company. Armstrong's employees on the Victoria job, members of Local 113, at their union officers' direction refused to apply these pre-mitered fittings.

The Contractors Association filed charges against the International Union and its Locals 22 and 113 on which general counsel for the Board issued a complaint charging that the refusals to apply the goods of Thorpe and Techalloy constituted an unlawful secondary boycott within the meaning of § 8(b)(4)(i) and (ii) (B) of the National Labor Relations Act as it now stands amended, 29 U.S.C. § 158(b)(4)(i) and (ii) (B),<sup>1</sup> asserting that at least "an object" of

<sup>1</sup> "It shall be an unfair labor practice for a labor organization or its agents—

\* \* \*

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . , to engage in, a strike or refusal in the course of his employment to use, . . . process, . . . or otherwise handle or work on any good, articles, materials, or commodities . . . or (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where in either case an object thereof is . . . .

\* \* \*

"(B) forcing or requiring any person to cease using, . . . handling, . . . or otherwise dealing in the products of

the refusal to apply, which admittedly amounts to coercion, was to require Johns-Manville and Armstrong to cease doing business with Thorpe and Techalloy. The International Union and the Locals denied that the refusals to use and apply the products of Thorpe and Techalloy constituted a secondary boycott. They asserted that the refusals were protected primary activity because the sole object thereof was to preserve work their members were entitled to perform by virtue of the ban on subcontracting in the collective bargaining agreement.<sup>2</sup>

After hearing, the trial examiner found that "this was not a boycott of nonunion products." And he ruled that "Articles VI and XIII of the agreement with the Contractors Association are lawful." Nevertheless he concluded that the refusal to handle Thorpe and Techalloy products was unlawful wherefore he recommended a cease and desist order against the local unions but not against the International Union saying that the dispute was a local one and that

---

any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . ."

<sup>2</sup> In the contract between Local 22 and the Contractors Association the employers agreed that in their operations outside the chartered territory of Local 22 they would abide by the rates of pay, rules and working conditions established by collective bargaining contracts between local insulation contractors and the local union in that territory. Local 113's contract with employers operating within its territorial jurisdiction where the work stoppage involving Armstrong's employees occurred contains a ban against subcontracting similar to the one in the contract between the Contractors Association and Local 22.

he had "no evidence that the International directed it or intervened in it."

The trial examiner rested his conclusion of unlawful activity by the local unions on § 8(e) of the Act, 29 U.S.C. § 158(e), quoted in material part in the margin.<sup>3</sup> He said that the agreement between the Contractors Association and Local 22 was "clearly a contract aimed at the exemption of Section 8(e)." But he said that the exemption did not apply because the evidence was clear that mitering and cutting bands, even when performed by Armstrong and Johns-Manville employees, was performed at their shops and not at the jobsite. In addition he ruled that, even if the workers were entitled to preserve the work of mitering and cutting bands by the contract, they were not entitled under the rule of the so-called *Sand Door* case, *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958), to resort to economic coercion to enforce the contract.

The three-member panel to which the Board delegated its powers pursuant to § 3(b) of the Act disagreed with the trial examiner and ordered the complaint dismissed in its entirety. Without discussing the impact of § 8(e) of the Act, although that section provided the basis for the trial examiner's decision,

---

<sup>3</sup> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, . . . whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, . . . or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract . . . containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, . . ."

the panel held that the activities of the two local unions were primary because "the object" thereof was to enforce the ban on subcontracting work properly claimed by the employees under the collective bargaining agreement the lawfulness of which it said appeared to be conceded. On the basis of its conclusion of no unlawful activity by the local unions, it dismissed the complaint as to the International Union.

One member of the panel dissented from the order insofar as it dismissed the charge against Local 113. The majority of the panel pointed out that although Local 113 had no contract with the Contractors Association, nevertheless the Association had agreed with Local 22 that its member companies when operating outside the territorial jurisdiction of that union would "abide by the rates of pay, rules and working conditions established by collective bargaining agreements between the Local (sic) insulation contractors and the local union in that jurisdiction" and that Local 113's contract in its jurisdiction contained a ban on subcontracting identical with that in Local 22's contract with the Association. Wherefore the majority held that whether Local 113 be "regarded as a third-party beneficiary of Local 22's bargaining contract or as agent of Local 22, it had the right to insist, in accordance with the terms of the contract, that Armstrong adhere to the lawful no-subcontracting clause." The dissenting member of the panel said that Local 113 was not a third-party beneficiary of Local 22's bargaining contract with Armstrong and that there was nothing to show that it was acting as agent for Local 22. He considered that since Local 113 had no agreement with the Contractors Association, its attempt to enforce the contract for the benefit of Local 22 constituted unlawful secondary activity.



The petitioner insists in this court that both the facts and the law require the Board to find that all three unions had violated § 8(b) (4) (i) and (ii) (B) of the Act.

On the facts, the petitioner contends that the record conclusively shows that "an object" of the refusals to apply was to force Johns-Manville and Armstrong to cease doing business with Techalloy and Thorpe. In support of this contention it would have us give conclusive effect to the testimony of one Brooks Baker, an officer of Local 22 and a vice-president of the International Union, who at one point testified that he had instructed the men not to handle the products of Thorpe and Techalloy because "we are not in agreement with Thorpe or Techalloy." This testimony does indicate that Baker at least may have believed that "an object" of the refusals to handle and apply was to force Johns-Manville and Armstrong to cease doing business with Thorpe and Techalloy. But the Board was not required as a matter of law to accept Baker's statement as gospel in the face of ample testimony, including later testimony of Baker himself, to the effect that the unions' objective was work preservation and in the face of the undisputed testimony that although Thorpe and Techalloy were non-union employers, neither local union had ever protested the use or application of any of their other products purchased by Johns-Manville or Armstrong but only protested the pre-cut bands and pre-mitered fittings. It may well be that the union officials hoped and expected, certainly we may assume that they would not have minded, if a result of their members' refusal to use and apply the bands and fittings was to put pressure on Techalloy and Thorpe as non-union employers. But hopes and expectations do not necessarily constitute "objects." An



illegal "object" is something more than a result, even an inevitable result, of a work stoppage for a legitimate reason. Otherwise the right to strike would for practical purposes be nullified, a result which Congress clearly did not intend. See *Retail Clerks Union Local 770 v. NLRB*, 296 F. 2d 368, 373 (C.A.D.C. 1961). The distinction to be drawn as best one can is between an object and a consequence. See *Local 761, International Union of Electrical Workers v. NLRB*, 366 U.S. 667, 672 *et seq.* (1961).

The petitioner also would have us find conclusive evidence of an unlawful union object in its use of gummed labels or decals. These were supplied by the International Union to employers under contract with its locals and were applied by the union workers to the goods they made. The decals bore serial numbers by which the employer could be identified. When Johns-Manville and Armstrong employees received the Techalloy bands and Thorpe mitered fittings without decals they refused to apply them.

The use of decals is in itself a neutral fact. The decals could be used as a means of boycotting non-union goods or they could be used as a means of policing the ban on subcontracting. There is ample testimony in the record to support the conclusion that in this case the decals were used to police the ban on subcontracting. Moreover, there is undisputed testimony that other products of Thorpe and Techalloy purchased by Armstrong and Johns-Manville, which of course did not bear union decals, were not boycotted, and there is testimony that certain products made by union members and labeled as such were not applied when the serial numbers on the decals indicated that the products were not fabricated by employees entitled to the work under the contract.

Finally the petitioner relies on four other cases involving the same International Union and various of its locals as establishing an illegal pattern of union conduct. Apart from the broad proposition that past misconduct is not conclusive evidence of present guilt, the cases relied upon are clearly distinguishable. Three of them, *International Association etc. and Local 24 (Speed-Line Mfg Co., Inc.)*, 137 NLRB 1410 (1962); *International Association etc. and Local 125 (Insul-Caustic Corp.)*, 139 NLRB 659 (1962), and *International Association and Local 2 (Speed-Line Mfg Co., Inc., and Fibrous Glass Products, Inc.)*, 139 NLRB, 688 (1962), involved "premolded" fittings, not "prefabricated" ones as in the case at bar. The distinction, as the Board pointed out, is crucial, for prefabricated fittings are essentially hand made and could and customarily had been prepared by members of International's local unions, whereas premolded fittings are factory made with the use of heat and heavy machinery to produce curved or "L" shaped insulation. Neither Thorpe nor Armstrong makes or has the facilities to make premolded fittings. Nor do the members of the locals have the skills to make such fittings. Thus in the cases cited above the Board quite reasonably concluded that in objecting to the use of premolded fittings the unions were not in fact seeking to obtain work claimable under their contracts but instead were objecting to the non-union status of the manufacturers of the premolded fittings.

The fourth case relied upon by the petitioner was decided by the Board subsequent to the case at bar and involved the same parties. *Local 22 International Association etc. and Houston Insulation Contractors Association (Mundet Cork Co.)*, 150 NLRB 156 (1965). In that case members of Local 22 employed

by Mundet Cork Co. refused to apply aluminum jacketing supplied by Johns-Manville ostensibly because it did not bear the union decal although in fact it had been made by union labor. The case is a peculiar one but it is readily distinguishable on the trial examiner's finding that the particular aluminum jacketing made by Johns-Manville had never been made and could not have been made by the Mundet employees and hence was not work within the contractual ban on subcontracting.

On the law, the petitioner relies primarily upon § 8(e) of the Act quoted in material part in footnote 3, *supra*. It asserts and we agree that the proviso exempting subcontracting jobsite work in the construction industry does not apply because the Board did not disturb the trial examiner's finding that the mitering and cutting of bands, even when performed by Armstrong and Johns-Manville employees, was performed in their shops and not at the jobsite. But we do not agree with the petitioner that § 8(e) absent its proviso renders the contractual ban on subcontracting unenforcible and void.

It is, of course, true that the agreement not to subcontract the work of preparation or application of insulation materials is in a certain sense an agreement whereby the employer agrees to refrain from handling, using or otherwise dealing in the products of another employer, if not also an agreement not to do business with another person. But to hold that a provision in the collective bargaining agreement against subcontracting was void and unenforcible because of its secondary effects would not square with *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), in which the Court held that "contracting out" work previously performed by members of an existing bargaining unit was a statutory subject of collective bar-



gaining under § 8(d) of the Act. Section 8(e) was aimed at so-called "hot cargo" agreements whereby a union in effect forced employers to agree in advance not to do business with other employers with whom the union was not in agreement. It was not the congressional purpose to outlaw such traditional and typical activity as seeking to guarantee preservation of work traditionally done by a bargaining unit. *NLRB v. Joint Council of Teamsters No. 38*, 338 F. 2d 23, 28 (C.A. 9, 1964), and cases cited. In short, § 8(e) applies only to those agreements which on their face require an employer to cease or refrain from handling, using or otherwise dealing in the products of another employer with whom the union has a dispute. "Primary subcontracting claims, on the other hand, fall outside the ambit of § 8(e) . . . ." *Orange Belt District Council of Painters, No. 48 v. NLRB*, 328 F. 2d 534, 537, 538 (C.A.D.C. 1964). An agreement banning the subcontracting of preparation work such as the one in the case at bar, not being a "hot cargo" agreement or on its face an attempt at a secondary boycott *in futuro*, § 8(e) does not apply.

We agree with the Board's dismissal of the complaint as to Local 22. We do not, however, agree with its dismissal of the complaint as to Local 113.

The problem presented by the refusal of the members of Local 113 to apply the pre-mitered fittings is so far as we know unique. As we have already pointed out Local 113 had no contract with Armstrong, although the Contractors Association of which Armstrong was a member had a contract with Local 22 which provided that members when operating outside the Local's jurisdiction "abide by the rates of pay, rules and working conditions established by collective bargaining agreements between the Local (sic) insulation contractors and the local union in that juris-

diction" and Local 113's bargaining contract in its jurisdiction contained a ban on subcontracting identical with that in Local 22's contract with the Contractors Association. On this basis the Board held that "Whether Local 113 is regarded as a third-party beneficiary of Local 22's bargaining contract or as agent of Local 22 it had the right to insist, in accordance with the terms of the contract, that Armstrong adhere to the lawful no-subcontracting clause." We do not agree.

The record is clear, as the trial examiner found, that mitering fittings would not have been done by members of Local 113 at the jobsite in Victoria, Texas, but would have been done by members of Local 22 employed by Armstrong at its shop in Houston. Thus the third party beneficiary theory is inapplicable because Local 113 would not have reaped any benefit from Local 22's contract. The agency theory has no factual support in the record. Moreover, we think the question presented by the behavior of Local 113 is not to be framed in terms of principles of the law of contracts or agency, developed in other contexts for other purposes. The fact of the matter is that Local 113 put economic pressure on an employer with whom it had no collective bargaining agreement to secure benefits to employees in another unit, Local 22. The question is whether such action by Local 113 comports with the underlying purposes and objectives of the Act. We think it does not.

Since Local 113 was not attempting to procure work for its members (they would not have done the mitering anyway) if it was not attempting to force Armstrong to cease and refrain from doing business with Thorpe, it was engaging in a controversy not its own but in Local 22's controversy with Armstrong. No doubt Local 113 had an emotional interest in com-



ing to the aid of its sister local. But it had no economic interest in Local 22's claim of breach of contract. We think an emotional interest is too weak to justify conduct which necessarily has coercive impact on a neutral employer. Even if, strictly speaking, Local 113 was not engaged in a secondary boycott, it was coercing Armstrong not for its own benefit but for the benefit of another local at the expense of a neutral employer. We think the thrust of the Act, particularly § 8(b)(4), as set out in many secondary boycott cases<sup>4</sup> is to require each union to restrict its economic coercion to its own labor disputes and not to use that weapon in aid of another union.

Since we are affirming the order of the Board in part and reversing it in part the basis for the Board's declining to pass on the involvement of the International Union, i.e., its finding that neither local had violated the Act, is destroyed. The case must go back to the Board for decision of the question of the International Union's participation in Local 113's work stoppage.

*The Order of the Board is enforced in part and reversed in part, and the case is remanded to the Board for further proceedings consistent with this opinion.*

---

<sup>4</sup> See *NLRB v. Denver Bldg. Council*, 341 U.S. 675, 692 (1951), in which the Court described the congressional objectives of the Act as "... of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.

APPENDIX B  
IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 21,910

---

HOUSTON INSULATION CONTRACTORS ASSOCIATION,  
PETITIONER

*versus*

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

---

DECREE

Before: Woodbury,\* Wisdom and Bell, Circuit Judges  
BY THE COURT:

THIS CAUSE came on to be heard upon a petition of the Houston Insulation Contractors Association to review and set aside an order of the National Labor Relations Board issued on September 4, 1964, dismissing a complaint against International Association of Heat and Frost Insulators and its Locals 22 and 113. The Court heard argument of respective counsel on March 25, 1965, and has considered the briefs and transcript of record filed in this cause. On March 9, 1966, the Court, being fully advised in the premises handed down its opinion affirming the said

---

\* Senior Judge of the First Circuit sitting by designation.

order of the Board in part and reversing in part, and remanding the case to the Board for further proceedings consistent with its opinion. In conformity therewith it is hereby

**ORDERED, ADJUDGED, AND DECREED** by the United States Court of Appeals for the Fifth Circuit that that part of the Board's order dismissing a complaint against Local 22, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO be affirmed and that the part of the order dismissing the complaint against International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, and its Local 113, be reversed.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the case be remanded to the Board for further proceedings consistent with the opinion of this Court.

**ENTERED MAR 31 1966**

## APPENDIX C

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Section 8(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: \* \* \*

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other pro-



ducer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; \* \* \*

\* \* \*

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8 (b) (4) (B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include per-



sons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

**In the Supreme Court of the United States**

**OCTOBER TERM, 1966**

---

**No. 206**

**HOUSTON INSULATION CONTRACTORS ASSOCIATION,  
PETITIONER**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT**

---

**MEMORANDUM FOR THE NATIONAL LABOR  
RELATIONS BOARD**

---

The principal question presented by the petition is whether a clause in a collective bargaining agreement that prohibits the employer from subcontracting certain work violates Section 8(e) of the National Labor Relations Act (the "hot cargo" provision). A subsidiary question is whether a work stoppage to enforce that clause, instituted by the union (Local

22 of the International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO) that signed the agreement, violates Section 8(b)(4)(B) (the secondary boycott provision). The Board found that the clause was outside the prohibition of Section 8(e) because its purpose was merely to protect the work of the bargaining unit covered by the contract, and that the work stoppage by the union to enforce the clause did not violate Section 8(b)(4)(B). 148 N.L.R.B. 866. The court of appeals sustained the Board's findings in this regard (Pet. 9a-19a).

Although we believe that the court of appeals was correct in upholding the foregoing Board findings, the questions presented are the same as those involved in *National Woodwork Manufacturers Association v. National Labor Relations Board*, and *National Labor Relations Board v. National Woodwork Manufacturers Association*, Nos. 110 and 111, this Term, certiorari granted, June 6, 1966. In addition, the Board is petitioning for a writ of certiorari to review the decision below insofar as it rejects the Board's further finding that a work stoppage by Local 113 (which was not a party to the collective bargaining agreement) to help Local 22 enforce its lawful work preservation clause was also

lawful (Pet. 19a-21a). Accordingly, we do not oppose the granting of the present petition.

Respectfully submitted.

**THURGOOD MARSHALL,**  
*Solicitor General.*

**ARNOLD ORDMAN,**  
*General Counsel,*

**DOMINICK L. MANOLI,**  
*Associate General Counsel,*

**NORTON J. COME,**  
*Assistant General Counsel,*  
*National Labor Relations Board.*

**AUGUST 1966**

# INDEX

|   | PAGE |
|---|------|
| OPINIONS BELOW .....  | 1    |
| JURISDICTION .....  | 1    |
| STATUTE INVOLVED .....  | 2    |
| QUESTIONS PRESENTED .....   | 2    |
| 1. Whether the Court Below Erred in Affirming the Finding of the National Labor Relations Board That the Only Object of Strikes by Employees of Petitioner's Members Was Work Preservation in the Face of the Unrefuted Admission of the Union Secretary and Vice President That a Reason for the Refusal to Apply Materials Purchased by Petitioner's Members Was Because the Union Had No Contract with the Suppliers Thereof ..... | 2    |
| 2. Whether the Subcontracting Provision of a Labor Agreement in the Construction Industry May Be Enforced by a Strike Against Materials of Suppliers Not Engaged in any Work on the Jobsite .....   | 2    |
| STATEMENT OF THE CASE .....   | 2    |
| A. THE JOHNS-MANVILLE JOB .....   | 4    |
| B. THE ARMSTRONG JOB .....  | 4    |
| C. THE PURPOSE OF THE STRIKES .....   | 4    |
| 1. The Testimony of International Vice President Baker .....  | 4    |
| 2. The Testimony of Business Agent Shrode (Local 22) .....  | 6    |
| 3. The Testimony of Business Agent Eaton (Local 113) .....  | 6    |
| D. THE USE OF DECALS .....  | 7    |
| E. THE INTERNATIONAL UNION'S INSTRUCTIONS FOR THE USE OF DECALS .....   | 7    |
| F. THE EVIDENCE RELIED UPON BY THE BOARD AND COURT BELOW .....  | 8    |
| 1. The Decision of the Trial Examiner .....   | 9    |
| 2. The Decision of the Board .....  | 9    |
| 3. The Decision of the Court Below .....  | 10   |
| SUMMARY OF THE ARGUMENT .....   | 10   |



|   |           |
|---|-----------|
| <b>ARGUMENT .....</b>   | <b>11</b> |
| I. In Reviewing the Finding of the Board That the Only Object of the Refusal to Handle Thorpe and Techalloy Products Was Work Preservation, the Court Below Failed to Give Proper Consideration to the Record as a Whole, as Required by § 10(f) of the Act and Decisions of this Court ..... | 11        |
| II. The Provisions of Section 8(b)(4)(i) and (ii)(B) and 8(e) of the Act Proscribe the Application of Articles VI and XIII of the Contract to Materials of Secondary Employers Manufactured or Fabricated Off the Site of the Construction .....  | 15        |
| A. The Board and the Court Below Have Interpreted Section 8(b)(4)(i) and (ii)(B) To Permit An Unlawful Boycott of the Materials of Secondary Employers If One of the Objects Is To Preserve the Work Which a Trade Claims as Its Own .....  | 15        |
| B. The Holding of the Court of Appeals That the Contract Must Constitute a Boycott On Its Face Squares with Neither Logic Nor the Language of Section 8(e) .....  | 18        |
| <b>CONCLUSION .....</b>   | <b>28</b> |
| <b>APPENDIX .....</b>   | <b>29</b> |
| <b>CERTIFICATE OF SERVICE .....</b>   | <b>31</b> |

## LIST OF AUTHORITIES

### Cases

|  |            |
|--|------------|
| <i>Fibreboard Paper Prod. Corp. v. NLRB</i> , 379 U.S. 203 (1964) .....  | 16         |
| <i>Local 761, Int'l Union of Elec. Radio &amp; Machine Workers v. NLRB</i> , 366 U.S. 667 (1961) .....                                     | 14         |
| <i>National Woodwork Mfrs. Ass'n v. NLRB</i> , 354 F. 2d 594 (7th Cir. 1965) .....   | 27         |
| <i>NLRB v. American Car &amp; Foundry Co.</i> , 161 F. 2d 501 (7th Cir. 1947) .....  | 15         |
| <i>NLRB v. Denver Bldg. &amp; Constr. Trades Council</i> , 341 U.S. 675 (1951) .....   | 10, 15, 16 |
| <i>NLRB v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen &amp; Helpers of America, Local 294</i> , 342 F. 2d 18, (2nd Cir. 1965) ..... | 24         |
| <i>NLRB v. Montgomery Ward &amp; Co.</i> , 192 F. 2d 160 (2nd Cir. 1951) .....   | 15         |

|   |           |
|---|-----------|
| <i>NLRB v. Pittsburgh S.S. Co.</i> , 337 U.S. 656, 660 (1949) .....   | 13        |
| <i>NLRB v. Washington-Oregon Shingle Weavers Dist. Council</i> ,<br>211 F. 2d 149 (9th Cir. 1954) .....   | 27        |
| <i>Local 1976, United Bhd. of Carpenters &amp; Joiners of America</i><br><i>v. NLRB (Sand Door)</i> , 357 U.S. 93 (1958) .....  | 9, 11, 24 |
| <i>Truck Drivers Union Local No. 413, Int. Bhd. of Teamsters</i><br><i>etc. v. NLRB</i> , 334 F. 2d 539 (D.C. Cir.), <i>cert. denied</i> , 379<br>U.S. 916 (1964) ..... | 26        |
| <i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951) .....   | 10, 11    |
| <i>United Mine Workers of America</i> , 144 NLRB 228 (1963) .....   | 19        |
| <i>United States v. White</i> , 322 U.S. 694; 702 (1944) .....  | 14        |

### Statutes

|  |    |
|--|----|
| National Labor Relations Act, 61 Stat. 136, 29 U.S.C.,<br>Sec. 158 ..... | 29 |
| Section 8(b)(4)(B) .....   | 15 |

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1966

---

No. 206

---

HOUSTON INSULATION CONTRACTORS ASSOCIATION,  
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

**BRIEF OF PETITIONER, HOUSTON  
INSULATION CONTRACTORS ASSOCIATION**

---

**OPINIONS BELOW**

The opinion of the Court of Appeals for the Fifth Circuit is reported at 357 F. 2d 182 (R. 232). The Decision and Order of the National Labor Relations Board and the Trial Examiner's Decision are reported at 148 NLRB 866 (R. 197, 176).

**JURISDICTION**

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 31, 1966 (R. 243). Petition for Writ of Certiorari, timely filed by Petitioner, was granted on October 10, 1966 (R. 245). The jurisdiction of this Court is derived from 28 U.S.C. § 1254(1).

## **STATUTE INVOLVED**

This case involves pertinent parts of the National Labor Relations Act ("Act"), as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 158, §§ 8(b)(4)(i) and (ii)(B) and 10(f). They are printed in the Appendix at pages 29 to 31.

## **QUESTIONS PRESENTED**

1. Whether the Court Below Erred in Affirming the Finding of the National Labor Relations Board That the Only Object of Strikes by Employees of Petitioner's Members Was Work Preservation in the Face of the Unrefuted Admission of the Union Secretary and Vice President That a Reason for the Refusal to Apply Materials Purchased by Petitioner's Members Was Because the Union Had No Contract with the Suppliers Thereof.

2. Whether the Subcontracting Provision of a Labor Agreement in the Construction Industry May Be Enforced by a Strike Against Materials of Suppliers Not Engaged in any Work on the Jobsite.

## **STATEMENT OF THE CASE**

The central issue in this case is the legality of a refusal by members of Local Unions No. 22 and No. 113 (individually referred to as "Local 22" or "Local 113"), affiliates of the International Association of Heat and Frost Insulators and Asbestos Workers ("Union"), to apply certain materials on the jobsite upon instruction by the Union. These materials were furnished to Association members, Johns-Manville Sales Corporation ("Johns-Manville") and Armstrong Contracting & Supply Corporation ("Armstrong") by two off-jobsite, nonunion suppliers, Techalloy Company, Inc. ("Techalloy") and Thorpe Products Corporation

("Thorpe"), at two separate construction projects at Texas City and Victoria, Texas.

The Houston Insulation Contractors Association ("Association"), an employers' association of which Johns-Manville and Armstrong are both members, filed charges with the General Counsel of the National Labor Relations Board ("Board"). The Association alleged that the conduct of refusing to handle the materials, which was in fact a strike, was a secondary boycott of the products of Tech-alloy and Thorpe in violation of the provisions of Sections 8(b)(4)(i) and (ii)(B) of the Act.

The Association and Local 22 are signatories to a labor agreement covering the striking employees. This agreement contains two articles known as "subcontracting" and "preparation" clauses, which are the basis of the present dispute.

The two clauses provide in pertinent part:

#### Article

#### VI

"The Employer agrees that he will not sublet or contract out any work described in Article XIII ..."

#### Article

#### XIII

"This agreement covers the rates of pay, rules and working conditions of all Mechanics and Improvers engaged in the preparation, distribution and application of pipe and boiler coverings, insulation of hot and cold surface ducts, flues, etc., also the covering of cold piping and circular tanks connected with the same, and



4

all other work included in the trade jurisdictional claims of the Union." (Chg. Pty. Ex. 1; Jt. App. 35, 132-145).\*

The facts concerning the two construction projects involved in the case are detailed separately hereafter.

### **A. THE JOHNS-MANVILLE JOB**

Johns-Manville, a subcontractor, was to furnish insulation on an applied basis at the American Oil Company's barge pipe ammonia loading dock being constructed at Texas City, Texas. In the course of performing its contract, Johns-Manville purchased precut stainless steel bands from Techalloy, a nonunion manufacturer and supplier not working on the jobsite. The Union directed the members of Local 22 to refuse to handle the materials supplied by Techalloy. The Union then informed the Johns-Manville contract manager that Johns-Manville was not permitted to subcontract or sublet the cutting of stainless steel bands to any other contractor and that its members would not handle any precut stainless steel bands purchased from any other employer. Union Business Agent Shrode told the Johns-Manville contract manager that the precut bands would not be applied without decals affixed to them, and that such decals would not be affixed "because they [the bands] were cut by someone other than an asbestos worker", and for that reason a member of Local 22 could not affix decals to them, and they would not be applied without decals affixed. (Jt. App. 60, 65).

### **B. THE ARMSTRONG JOB**

Armstrong, also a subcontractor, was engaged in applying insulation to pipes at an E. I. DuPont de Nemours &

---

\* By stipulation of the parties hereto, the Joint Appendix containing the evidence filed in the Court of Appeals has been filed as part of the Record in this Court. Citations herein to "Jt. App." are to that document.

Company ammonia plant being constructed at Victoria, Texas. In the course of performing the contract, it twice purchased mitered asbestos fittings from Thorpe. The fittings were manufactured in Thorpe's shop by nonunion employees.

When the fittings were delivered to the jobsite, the union members refused to apply them. The Business Agent for Local 113, who admitted that he was merely carrying out orders, told the job "foreman," who, in the asbestos trade, is an active union member working on the job, that the fittings would not be applied unless they bore union decals (Jt. App. 53, 54, 58).

### **C. THE PURPOSE OF THE STRIKES**

#### **1. The Testimony of International Vice President Baker:**

Brooks Baker, an International Vice President of the Union and Secretary of Local 22 (Jt. App. 78), who was called as a witness by and on behalf of the International Union, testified as to the purposes of the strikes and the Union's objects in calling them (Jt. App. 78, 79).

In answer to questions by the International Union's attorney, Baker testified unequivocally that Local 22 had instructed its members not to use the products of Thorpe and Techalloy "in all circumstances" because neither of the suppliers was "in agreement" with the Union (Jt. App. 79). When the Union's attorney "suggested" that Baker "misunderstood" his question, the Trial Examiner interrupted and asked:

"You mean you have no contract with them?"  
to which Baker responded:

"No contract, no."

Although witness Baker subsequently testified that the Union members were instructed not to use the products of Thorpe and Techalloy because such would violate Articles VI and XIII of the Contract (Jt. App. 78-80), no explanation, qualification or denial of the above quoted statement was ever given by Mr. Baker.

## **2. The Testimony of Business Agent Shrode (Local 22):**

In answer to questions by the Board's attorney on cross-examination, Local 22 Business Agent Shrode admitted that he knew that Techalloy did not have a contract with the Union, was not a member of the Petitioner Association, and that its employees precut the metal bands (Jt. App. 106). Shrode admitted that he had instructed the jobsite employees not to apply the Techalloy bands because they had not been precut by Johns-Manville employees (Jt. App. 107).

Other evidence showed that an asbestos worker, a member of Local 22, was told by Business Agent Shrode that union decals could not be put on the Techalloy bands because they had been cut by someone other than an asbestos worker or Local 22 (Jt. App. 60). This was related to the Johns-Manville contract manager by the asbestos worker.

The Johns-Manville contract manager testified that precut aluminum bands were applied on the NASA job without objection by the Union, although the Business Agent denied knowledge of that (Jt. App. 63, 67-68).

## **3. The Testimony of Business Agent Eaton (Local 113):**

The significant testimony of Business Agent Eaton of Local 113 shows that the strike was halted when he was

given proof orally and by letter that the mitered fittings were made in the Armstrong shop in Houston and that he was only following instructions in calling the strike (Res. Ex. 1; Jt. App. 110-111, 116-117).

#### **D. THE USE OF DECALS**

The evidence relating to the use of decals to identify "union made" goods points exclusively to their use in this case for the unlawful purpose of boycotting nonunion products. The decal is a gummed label which the Union requires the employee in charge of the shop to affix to each product as it is fabricated (Jt. App. 88-89). The decals are attached to indicate that the materials have been made by the employee of a contractor working under the Union agreement (Jt. App. 95). Decals are issued only to an employer who is in a contractual relationship with the Union (Jt. App. 98). Such employers are entitled to obtain decals even though they employ nonunion employees (Jt. App. 102). A nonmember employee working for a contractor who is under contract with the Union would be issued decals (Jt. App. 102).

#### **E. THE INTERNATIONAL UNION'S INSTRUCTIONS FOR THE USE OF DECALS**

Speaking for the General Executive Board of the International Union, Vice President Baker issued a memorandum to the local unions on May 27, 1963, which explains the purpose and use of the decals as fixed by the International. The memorandum states that the General Executive Board had "approved" the use of decals in order to identify the *asbestos worker* who performed the work on the material to which it is attached. Such decals were required to be placed on fabricated fittings even though they were made by a different union membership located away from the

*"fabrication shop site."* A member who fabricated material and failed to affix the decal "signifying union made" was made equally responsible with the member who applied material without decals (G.C. Ex. 2; Jt. App. 96, 114-115).

## **F. THE EVIDENCE RELIED UPON BY THE BOARD AND COURT BELOW**

The evidence relied upon by the Board and the court below to find that the conduct of the Union "constituted protected primary activity and was not for an *object* proscribed by the . . . Act" was that the work of cutting metal bands and mitering fittings was reserved for the employees of Johns-Manville and Armstrong and could not be sub-contracted.

The Board decision states that purchases of the materials deprived the Johns-Manville and Armstrong employees of work to which they were entitled under the contract, and that the Union's refusal to handle the Thorpe and Techalloy products was in protest of such deprivation. This, reasoned the Board, was a primary activity protected by the Act. The Board made no mention of the other testimony or conduct related heretofore, which evidences a second and equally sought-after "object" of the strike.

The court below held that "the Board was not required as a matter of law to accept Baker's statement as gospel" in view of the later testimony that the Union's objective was work preservation, because neither local union had ever protested the use or application of any other product purchased by Johns-Manville or Armstrong, because the decals were used to police the ban on subcontracting, and because the Union did not refuse to apply other products of Techalloy and Thorpe purchased by Johns-Manville and Armstrong not bearing union labels. The finding of the Trial Examiner was that the mitering and cutting, even



when performed by Johns-Manville and Armstrong, were performed at their shops and not at the jobsite (R. 185).

### 1. The Decision of the Trial Examiner:

The Trial Examiner found the activity of the Union was not a boycott of nonunion goods and that Articles VI and XIII of the contract are lawful. Then, stating the case in a posture most favorable to the Union, he found the Union's refusal to handle the Thorpe and Techalloy products to be unlawful on the ground that the exemption of Section 8(e) of the Act applies only to work to be done at the jobsite; it does not apply to goods manufactured off the jobsite but later shipped there for installation. Moreover, the Examiner found that even if the application of the Thorpe and Techalloy products had been jobsite construction work within Section 8(e), the Union's refusal to handle these products would have been unlawful under *Local 1976, United Brotherhood of Carpenters & Joiners of America v. NLRB*, (Sand Door) 357 U.S. 93 (1958). The Examiner exonerated the International (R. 186-187), but found both Local 113 and Local 22 to be guilty of unfair labor practices within Section 8(b)(4)(i) and (ii)(B) of the Act.

### 2. The Decision of the Board:

The Board found that the purchase of the Thorpe and Techalloy materials had deprived the Johns-Manville and Armstrong employees of work customarily performed by them and that the object of the Union's conduct was to protect or preserve this work. Accordingly, the Board reversed the Trial Examiner and held the Union's activity to be primary and protected (R. 201-202). The Board did not discuss the testimony of Baker or any other testimony pointing to the other object of the Union's activity, or Section 8(e) of the Act.

### 3. The Decision of the Court Below:

The court below affirmed the Board in part, holding that Section 8(e) applies only to those agreements which on their face require an employer to cease or refrain from handling, using or otherwise dealing in the products of another employer with which the Union has a dispute. Primary subcontracting claims, on the other hand, were said to fall outside the ambit of Section 8(e). It also held that an agreement banning the subcontracting of preparation work, as here, not being a "hot cargo" agreement or on its face an attempt at secondary boycott *in futuro*, is not prohibited by Section 8(e) (R. 241).

The court below reversed the Board as to its finding of the conduct of Local 113 (Armstrong job), saying that the thrust of the Act, and particularly Section 8(b)(4), is to require each union to restrict its economic coercion to its own labor disputes and not use that weapon in aid of another union as Local 113 had in aid of Local 22 (R. 242-243).

## SUMMARY OF THE ARGUMENT

I. The standard for review of the findings of the Board as stated by *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), which both the Board and the lower court failed to apply properly, necessitates a finding that one "object" of the strikes called by Local Unions No. 22 and No. 113 was to boycott the materials of off-jobsite suppliers. This finding, in turn, would be sufficient under *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951), to render the strike an unfair labor practice even, *assuming arguendo* that Section 8(e) would not render unlawful a strike called for another object, i.e., work preservation.

II. The plain language of Section 8(e) of the Act and its legislative history show that such provision was intended

to render unlawful any agreement preventing subcontracting of work to be done off the jobsite in the construction industry. Although the contract upon which the instant case is based is not unlawful on its face, a strike seeking to enforce the contract so as to bring about a cessation of business with another employer is unlawful despite the fact that preservation of work for the union is also an object of the strike. The law as established in *Sand Door (Local 1976, United Bhd. of Carpenters & Joiners of America v. NLRB)*, 357 U.S. 93 (1958), was unchanged by the 1959 amendments to the Act so that a strike to enforce a contract which causes an employer to cease doing business with another employer, whether on or off the jobsite, is unlawful.

## **ARGUMENT**

### **I.**

**In Reviewing the Finding of the Board That the Only Object of the Refusal to Handle Thorpe and Techalloy Products Was Work Preservation, the Court Below Failed to Give Proper Consideration to the Record as a Whole, as Required by § 10(f) of the Act and Decisions of this Court.**

In *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), this Court delineated the test to be applied in determining whether a finding of the Board is supported by substantial evidence and held that such determination shall not be made merely by a consideration of evidence which would justify the finding but shall be made upon consideration of all of the evidence. The rule established by this Court does not permit evidence of a separate fact not in conflict with other facts in testimony by the same witness, which would unmistakably prove a violation of the Act, to be ignored or distinguished. Nevertheless, this is precisely what the Board and the court below did.

Brooks Baker, the Secretary of Local 22 and Vice President of the International Union, testifying in answer to questions from Union counsel, admitted unequivocally that the local had instructed its members not to use the products of Thorpe and Techalloy under all circumstances because "we are not in agreement with Thorpe or Techalloy." Counsel for the Union attempted to suggest that Baker had not understood the question, but the Trial Examiner interposed the question: "You mean you have no contract with them?" To which Baker replied: "No contract, no." (Jt. App. 78-79)

Although Baker subsequently testified that the members would not handle the materials of the two nonunion suppliers because to do so would constitute a breach of contract these two statements from a single witness, the obviously knowledgeable International Vice President who answered the question not in ordinary lay language but in the very language of the Act, did not present to the Board "a choice between two fairly conflicting views," from which the Board could properly conclude that the only object of the refusal was work preservation under the provisions of the contract.

The Board refused to recognize the significance of this testimony. The court below attempted to distinguish it in view of later testimony not contradictory of the earlier statement, and held that the Board, as a matter of law, was not required to accept Baker's testimony with all of its legal implications (R. 237). The strained efforts of the court below to circumvent the effect of this admission against interest by the principal Union spokesman demonstrates the erroneous approach of the Court of Appeals to its review of the record before the Board. The Court attempts to create a conflict between this admission and other evidence to rule that the Board did not have to accept this



statement "as gospel." However, it is inescapable that there is no conflict between evidence which shows that there were two motives or objects for the conduct of the Union.

Of course, Petitioner here makes no claim of bias by the Board or the court below in the handling of this evidence. However, that such an admission against interest may not be ignored is evident from the holding of this Court in *NLRB v. Pittsburgh S.S. Co.*, 337 U.S. 656, 660 (1949), in which a claim that discrediting evidence gave proof of bias was asserted. This Court approved the following quotation from an opinion from the United States Court of Appeals for the Fifth Circuit, in which Judge Hutcheson had stated:

"Unless the credited evidence . . . carries its own death wound, that is, is incredible and therefore, cannot in law be credited, and the discredited evidence, . . . carries its own irrefutable truth, that is, is of such nature that it cannot in law be discredited, we cannot determine that to credit the one and discredit the other is an evidence of bias."

Petitioner submits that an admission against interest by a high union official "carries its own irrefutable truth" and may not be disregarded. The court below recognized that the testimony of Baker referred to ". . . does indicate that Baker at least may have believed that 'an object' of the refusals to handle and apply was to force Johns-Manville and Armstrong to cease doing business with Thorpe and Techalloy." If the testimony of the Local Union Secretary and International Vice President as to his beliefs of the objects of the refusal are not to be binding upon both the Local and International Unions, an employer will find it impossible to obtain relief from admittedly illegal conduct.

Baker's admission of the Union's improper motivation is substantiated by the publication "General Information — Subject: Decal Labels," which explains that decals were to



be used to reveal whether materials or products were union-made. (Jt. App. 114-115) This publication demonstrates the approval of International Union Executive Board of the purpose and use of decals to show whether or not materials furnished to union members for application are union-made, and thus, this evidence is binding against the International Union as well as the local. *United States v. White*, 322 U.S. 694, 702 (1944).

In *Local 761, Int'l Union of Elec. Radio & Machine Workers v. NLRB*, 366 U.S. 667 (1961), this Court discussed the difference in legitimate primary activity and secondary activity in connection with reserve gate picketing which had a more than incidental adverse effect on a neutral employer. The Court recognized the problem of ascertaining the object of the picketing and said:

"However difficult the drawing of lines more nice than obvious, the statute compels the task. Accordingly, the Board and the courts have attempted to devise reasonable criteria drawing heavily upon the means to which a union resorts in promoting its cause. Although '[n]o rigid rule which would make . . . [a] few factors conclusive is contained in or deducible from the statute,' *Sales Drivers v. Labor Board*, 229 F. 2d 514, 517 '[i]n the absence of admissions by the union of an illegal intent, the nature of acts performed shows the intent.'" 366 U.S. at 674.

The present case appears to be one of those rare instances where there is an admission by the union of an illegal intent. The standard of *Universal Camera* has been misapprehended and grossly misapplied, because the court below did no more than select one of two stated objects of the strike upon which to base its affirmance of the Board. This fact determination, if indeed there is a fact question, is not supported by substantial evidence on the record considered as a whole,

and a reversal is required. *NLRB v. Montgomery Ward & Co.*, 192 F. 2d 160 (2nd Cir. 1951); *NLRB v. American Car & Foundry Co.*, 161 F. 2d 501 (7th Cir. 1947).

The fact that a lawful "object" of the union conduct exists along with another illegal "object" does not render the strike lawful. *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951).

## II.

**The Provisions of Section 8(b)(4)(i) and (ii)(B) and 8(e) of the Act Proscribe the Application of Articles VI and XIII of the Contract to Materials of Secondary Employers Manufactured or Fabricated Off the Site of the Construction.**

**A. The Board and the Court Below Have Interpreted Section 8(b)(4)(i) and (ii)(B) To Permit An Unlawful Boycott of the Materials of Secondary Employers If One of the Objects Is To Preserve the Work Which a Trade Claims as Its Own.**

If the "work preservation" doctrine is entitled to judicial sanction merely by a union avowing that *one* of its strike objectives was the preservation of work, the fundamental concept of proscription of secondary boycotts as contained in the 1959 amendment of the Act will be nullified. The intent of the Congress that such should not be the effect of the 1959 amendment in attaching to Section 8(b)(4)(B) the proviso:

**"That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"**

and adding Section 8(e):

**"It shall be an unfair labor practice for any labor organization and any employer to enter into any con-**

tract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: . . .*"

is clearly discernable from the reports of the history of this legislation, which will be discussed below. The plain language of the Act as amended, however, demonstrates that the Court of Appeals erred by holding that even absent the proviso of Section 8(e), the strike was protected because the "contracting out of work" is a statutory subject of collective bargaining under Section 8(d), citing *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964). *Fibreboard*, however, involved a refusal to bargain under Section 8(a)(5), not a strike to enforce a contract provision in such a fashion as to create an unlawful secondary boycott. Such a strike was not lawful before the 1959 amendments and is still unlawful. The proviso added to Section 8(b)(4)(B) protects only lawful primary action.

In construing Section 8(b)(4)(A)\* in *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951), this Court held that if *an object of the strike is unlawful, the strike is unlawful*, stating:

---

\* This section has become Section 8(b)(4)(B) by the 1959 amendments to the Act.

"It is not necessary to find that the sole object of the strike was that of forcing the contractor to terminate the subcontractor's contract. This is emphasized in the legislative history of the section.<sup>18</sup>"

Noting the prohibitions of the Norris-LaGuardia Act upon the halting of strikes, including secondary boycotts, by the federal courts, the Court quoted Senator Taft's explanation of this section:

"It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provisions dealing with secondary boycotts as to make them an unfair labor practice. 93 Cong. Rec. 4198." 341 U.S. at 686.

and held that Section 8(b)(4) "... restricts a labor organization and its agents in the use of economic pressure where an object of it is to force an employer or other person to boycott someone else."

If, as admitted by the Union Vice President, an object of the strike here was to boycott the goods of nonunion suppliers Thorpe and Techalloy, whether or not for simultaneous work preservation objectives, the strike was unlawful. Without that admission, however, the provisions of Section (8)(e) would outlaw the strike.

---

<sup>18</sup> "Senator Taft, Sponsor of the bill, stated in his supplementary analysis of it as passed: 'Section 8(b)(4), relating to illegal strikes and boycotts, was amended in conference by striking out the words "for the purpose of" and inserting the clause "where an object thereof is."' 93 Cong. Rec. 6859." 341 U.S. at 689.

**B. The Holding of the Court of Appeals That the Contract Must Constitute a Boycott On Its Face Squares with Neither Logic Nor the Language of Section 8(e).**

Section (8)(e) proscribes all agreements between employers and unions which provide that the employer will not do business with others, except in the garment industry and in the construction industry where jobsite subcontracting is the subject of such agreement.

The contract here in dispute does not on its face violate this provision. It is the contention of Petitioner, however, that if Local 22 and Petitioner could not enter into a contract which would prevent Johns-Manville from doing business with an off the jobsite contractor, it is unlawful for the Union to enforce its contract by a strike which has that result. That is, the contract becomes unlawful under Section 8(e) when applied to subcontracting of work to be performed off the jobsite. That Congress intended to outlaw any agreement which would affect off jobsite contractors or suppliers is apparent not only from the language of Section 8(e) but from the legislative history of that section as well.

Perhaps the best indication of the intent of Congress in enacting Section 8(e) is the remarks of one of its staunchest opponents. Senator Wayne Morse, in speaking against the provisions of the bill that came from the Conference Committee, said:

"The bill makes it illegal for a union and an employer to enter into any contract or agreement, express or implied, whereby such employer ceases or agrees to cease to do business with another employer or person. This is the so-called hot cargo agreement . . . . .

*"First, It would prevent a union from protecting the bargaining unit it represents by obtaining an agreement*



*not to subcontract work normally performed by employees in the unit . . . . .*" (105 Cong. Rec. 16399).

The eminence of Senator Morse' statement is borne out by the Board decision in *United Mine Workers of America*, 144 NLRB 228 (1963), where the Board held that a clause claimed by the Union to be protection against the evils of subcontracting, was prohibited by Section 8(e). The Board's discussion of the construction industry jobsite exemption to Section 8(e) makes it clear that the Congressional purpose in the 1959 amendments was to eliminate boycotting even though it was "protective of unit work." 144 NLRB at 237-238. The construction industry exception in Section 8(e) is explicitly limited to "work to be done at the site of the construction." Language so clear and expressive of congressional purpose should not be disregarded lightly.

That it was the congressional purpose to outlaw such traditional and typical activity as seeking to guarantee preservation of work traditionally done by a bargaining unit if a boycott of an off jobsite contractor was involved, it is only necessary to refer to the remarks of then Senator John F. Kennedy concerning the report of the Conference Committee on S. 1555 (S. Doc. No. 51), 105 Cong. Rec. 16354, where he called particular attention to the construction industry exemption, saying that the proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or to suppliers such as Thorpe and Techalloy here, who do not work at the jobsite.

The full text of his statement appears hereafter.

"The first proviso under new section 8(e) of the National Labor Relations Act is intended to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.

*"This proviso affects only section 8(e) and therefore leaves unaffected the law developed under section 8(b) (4). The Denver Building Trades (341 U.S. 675) and the Moore Drydock (92 N.L.R.B. 547) cases would remain in force.*

*"Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them. Since the proviso does not relate to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) whenever the Sand Door case (357 U.S. 93) is applicable.*

*"It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract.*

*"It should be particularly noted that the proviso relates only to the 'contracting or subcontracting of work to be done at the site of the construction.' The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite." (Emphasis added). 105 Cong. Rec. 16415.*

Senator John F. Kennedy, speaking further on the Committee Report, clearly dispelled the misconception that only "hot cargo" agreements such as those spotlighted in Teamster contracts with motor carriers subject to Part II of the Interstate Commerce Act, which Senate Bill 1555 (Kennedy-Ervin) sought to ban were made unlawful by Section 8(e):

"Fourth. Hot cargo. The Landrum-Griffin bill extended the 'hot cargo' provisions of the Senate bill, which we applied only to Teamsters, to all agreements between an employer and a labor union by which the employer agrees not to do business with another concern. The Senate insisted upon a qualification for the clothing and apparel industries and for agreements relating to work to be done at the site of a construction project. Both changes were necessary to avoid serious damage to the pattern of collective bargaining in these industries."

See Summary Analysis of Conference Agreement as to Title VII, Taft-Hartley Amendments, Cong. Rec., 86th Cong., 1st Sess. (September 9, 1959), p. 17181.

On the day that the President signed the bill making Section 8(e) law, a controversy arose as to the applicability of "preparation clauses" such as found in Articles VI and XIII of the contract here, under Section 8(e). This revolved around the question whether the exemption covered work that "could be performed" at the jobsite or work that was "actually done" on the jobsite as well. Senator McNamara, an opponent of the bill, contended that in some trades, such as the plumbing trade, much prefabrication work such as bending pipe was performed "off the jobsite" and that he believed the Section 8(e) proviso was intended to cover all work that *could be done* at the construction site. 105 Cong. Rec. 19785.

Representative Carroll D. Kearns, one of the proponents of the curative legislation submitted and a proponent of the bill, became alarmed at Senator McNamara's strained construction. He stated that it was contrary to the bill's clear and literal meaning and would "open up a Pandora's box of evils in the construction industry which Congress

meant to eliminate." In that regard he pointed 'out the fallacy of Senator McNamara's argument, where he said:

"The Senate bill merely outlawed hot cargo agreements with common carriers. The House amendment interdicted agreements not to do business with another entered into by any employer. At the time of the consideration of this amendment there had been some discussion of a proposal to permit unions to picket a construction site if they had disputes with any contractor on the job. It was partly in this frame of reference that the proviso to section 8(e) was written which provides —

"That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of construction."

"As in the common-situs picketing problem, it was the location of the work that we had in mind and, as a reasonable compromise, we provided that the agreement must relate to work actually done at the site. Work done or products manufactured, processed, fabricated, and so forth by another employer away from the construction site could not be subject to a hot cargo agreement. *It was not intended to restrict an employer's freedom to do business or purchase from any other person and to decide in what form the product or materials shall arrive on the job.* Furthermore, to interpret the proviso to cover any work or product which could be done at the site would permit restrictions on the installation of many other products besides prefabricated pipe which arrive on the job in prefabricated form. This certainly was not in my mind.

"The conference report supports my view. It states, at page 39, that the proviso in question relates only and exclusively to the contracting or subcontracting of work to be done at the site of construction and that it does not exempt from section 8(e) agreements relat-

ing to supplies or other products or materials shipped to the site of construction. The legislative history in the Senate is also in accord with my view. On September 3, 1959, Senator Kennedy, in reporting the conference agreement to the Senate, said at page 16415 of the Record:

'It should be particularly noted that the proviso relates only to the 'contracting or subcontracting of work to be done at the site of the construction.' The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite.'

"Senator Morse also said, on the same day at page 16399 of the Record, in referring to the hot cargo amendment:

'First. It would prevent a union from protecting the bargaining unit it represents by obtaining an agreement not to subcontract work normally performed by employees in the unit.'

"The Senate Committee on Labor and Public Welfare printed a section by section analysis of the act, published September 10, 1959, and stated with respect to the section in question that the prohibition against hot cargo agreements does not apply to the construction industry relating to work to be done at the construction site.

"It seems clear to me, therefore, that an employer, even in the construction industry, retains the freedom to choose how the products or materials he utilizes shall arrive on the job — prefabricated or not — and that such freedom cannot be restricted by agreements with labor organizations." (Emphasis added). 105 Cong. Rec. 20005.

Thus, the Legislative History clearly indicates that agreements prohibiting the subcontracting of jobsite construction work to a non-union contractor would not be



unlawful, however, Section 8(e) would render unlawful all agreements prohibiting the subcontracting of off jobsite construction work. Therefore the Section 8(e) proviso would not insulate a union, which struck to enforce such an agreement, from an unfair labor practice charge under Section 8(b)(4)(i) or (ii)(B).

It was clearly the intention of Congress to retain existing law as to the enforcement of contracts covered by section 8(e) including those exempted by the proviso. The rule established by this Court in *Sand Door (Local 1976, United Bhd. of Carpenters and Joiners of America v. NLRB)*, 357 U.S. 93 (1958), that a union may not lawfully strike to enforce a contract which prevents an employer from doing business with another employer was intended to be unchanged, even if the contract is lawful under the proviso. Thus the trial Examiner was correct when he held:

"Nor would Respondents have been helped if the work had been jobsite construction work for a refusal to handle goods (sic.) for the purpose of enforcing such an agreement is unlawful under *Sand Door*. *Sand Door* was specifically stated in the legislative history to be controlling in construing the exemption proviso of Section 8(e). (Leg. Hist., Vol. 1, p. 943, *supra*; Leg. Hist., Vol. II, p. 1433, *supra*; Leg. Hist., Vol. II, p. 1829)."

"Respondents, then, were under a misapprehension if they believed the refusals were justifiable under their construction of their rights to protect their contract. The evidence here is clear that the mitring and cutting, even when performed by Armstrong and Johns-Manville employees, were performed at their shops and not at the jobsite." (R. 185-186).

*NLRB v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 294*, 342 F. 2d 18 (2nd Cir. 1965), clearly points up the error committed by

the Board and Court of Appeals. In the *International* case, Local 294 had a contract containing a "subcontracting" and "site work" clause, the latter being defined as "all work done on the site proper and all hauling from an area outside the project area to the project, which-outside area is operated and maintained by the prime contractor for use in conjunction with the project." This language is not on its face a "hot cargo" clause. A subcontractor, who had the excavation and concrete work under the prime contractor, ordered ready-mix concrete from a supplier of building materials "off the jobsite." The ready-mix drivers were members of the Carpenters Union, and the Teamsters refused to permit the wet cement to be driven onto the plant site unless the Teamsters members drove the trucks. The Board held that the preparation of mixing cement for delivery to the jobsite was part of the delivery process and thus not work to be done on the site of the work.

The Teamsters contended that the contract did not contravene Section 8(e), and therefore Section 8(b)(4)(ii)(A) was not violated. The Second Circuit Court of Appeals sustained the Board and held:

" 'Hot cargo' agreements in any form are prohibited by section 8(e). *Truck Drivers Union Local No. 413, Intern. Broth. of Teamsters v. NLRB*, 118 U.S. App. D.C. 149, 334 F. 2d 539, cert. denied, 379 U.S. 916 . . . " 342 F. 2d at 21.

Thus where a contractual provision, neutral on its face, becomes *as applied* a "hot cargo" clause, it is forbidden by Section 8(e). It follows that cement to be poured on the jobsite but hauled from off jobsite is not dissimilar to pre-cut bands or mitered fittings which are cut off jobsite for application on the jobsite.

In the *Local 413\** case, the Court of Appeals for the District of Columbia discusses the Board's position on subcontracting clauses, holding that it is not the fact of subcontracting, but a clause which limits the persons with whom subcontracts can be made which is unlawful\*\*. In this regard, the Board said:

"Like the typical hot cargo clause itself, a subcontractor clause is secondary where it limits, not the fact of subcontracting — either prohibiting it outright or conditioning it upon, e.g., current full employment in the unit — but the persons with whom the signatory employer may subcontract . . ." 334 F. 2d at 548

The court disagreed with the Board and pointed out the difference in the two types of clauses, which may control the situation here, where it said:

"This Board position groups together, as secondary, contract clauses which impose boycotts on subcontractors not signatory to union agreements, and those which merely require subcontractors to meet the equivalent of union standards in order to protect the work standards of the employees of the contracting employer. But the distinction between these two types of clauses is vital. Union-signatory subcontracting clauses are secondary, and therefore within the scope of § 8(e), while union-standards subcontracting clauses are primary as to the contracting employer (Citing authorities)." *ibid.*

The subcontracting clause here would not be unlawful *per se* under that rule because it does not state with whom

\* *Truck Drivers Union Local No. 413, Int. Bhd. of Teamsters etc. v. NLRB*, 334 F. 2d 539 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964).

\*\* The clause involved was as follows:

"The Employer agrees to refrain from using the services of any person who does not observe the wages, hours and conditions of employment established by labor unions having jurisdiction over the type of services performed."

subcontracting is forbidden, but it is not necessary that the limitation on subcontracting be spelled out in such clauses in order to constitute a violation under the statute where, as the testimony of Union Vice President Baker shows here, the prime contractor is limited to subcontracting "under all circumstances" with persons in agreement with the Union. That fact in itself would violate the Act under the Board's own decision. Where the Union refuses to handle the materials of two nonunion off-jobsite suppliers, such strike is unlawful under the decision of this Court in *Sand Door*.

The matter of prefabrication and subcontracting is also before this Court in *National Woodwork Mfrs. Ass'n v. NLRB*, 354 F. 2d 594 (7th Cir. 1965) (Nos. 110-111, October, 1966 Term), where factory machined doors were boycotted at the Frouge Corporation's job at the Naval Capehart Housing Project in Philadelphia. Rule 17 there involved differs from the subcontracting provision of Article VI of the Agreement before the Court in the instant case. It has, nevertheless, achieved the same ultimate result and has brought about a labor dispute, only one of the many predicted by Senator Taft. See *NLRB v. Washington-Oregon Shingle Weavers Dist. Council*, 211 F. 2d 149 (9th Cir. 1954). In the Frouge boycott the Court of Appeals for the Seventh Circuit adopted the "work preservation" rationale. In addition, it adopted the artificial "control" theory, not involved in the instant dispute, upon which it found Frouge to be the object of a "primary strike or primary picketing", and therefore held the union exempted by the proviso of Section 8(b)(4)(B).

The instant case differs from *Frouge* in that the testimony of the Union clearly shows that "an object" of the strike here was an intentional product boycott of Thorpe and Techalloy, who performed no work at the jobsite, because they were not union contractors. But, the cases

differ only in that respect, and even though the record in the instant case contains plain statements by the Union and Local 22 of their unlawful purpose, which would call for a reversal of the Board and the court below, the issue is broader than that. Both cases should be reversed upon the fundamental concept that they evince proscribed secondary boycotts which render the entire strike illegal even though the conduct of the unions is claimed also to be motivated by a hope of preserving work for a trade.

### CONCLUSION

The decision of the Court of Appeals should be reversed and the conduct of Local 22 found to be an unfair labor practice under a proper interpretation of Section 8(e). In the alternative, this case should be remanded to the Court of Appeals for a correct review of the record as a whole on the question of the propriety of the Board finding that the only object of the strike was work preservation.

Respectfully submitted,

W. D. DEAKINS, JR.  
2100 First City National  
Bank Building  
Houston, Texas 77002

*Counsel for Petitioner,  
Houston Insulation  
Contractors Association*

### *Of Counsel:*

ROSS N. STERLING  
VINSON, ELKINS, WEEMS & SEARLS  
First City National Bank Building  
Houston, Texas 77002



## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C., Sec. 158, are as follows:

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents —

. . . . .

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e); (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; \* \* \*

. . . . .

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from han-

dling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alternation, painting, or repair of a building, structure, or other work; *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

Sec. 10 (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the

aggrieved party shall file in the court the record, in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

#### **CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Brief of Petitioner were served upon Counsel for Respondent and the Solicitor General of the United States by placing the same in the United States Mails, Air Mail, postage prepaid, addressed to such Counsel at their addresses of record this ..... day of December, 1966.

.....  
**W. D. DEAKINS, JR.**  
*Attorney for Petitioner*

# CITATIONS INDEX

|  | Page |
|--|------|
| Opinions below   | 1    |
| Jurisdiction   | 1    |
| Questions presented  | 2    |
| Statute involved   | 3    |
| Statement  | 3    |
| A. The Board's findings of fact  | 3    |
| B. The Board's conclusions and order   | 8    |
| C. The decision of the court of appeals  | 9    |
| Summary of argument  | 10   |
| Argument   | 13   |
| I. Substantial evidence supports the Board's finding that the unions' objective, in inducing the refusals to install certain prefabricated materials, was a primary and therefore lawful one—to preserve work for the employees covered by Local 22's agreement with the employers—and was not directed against non-union products or otherwise secondary in nature; that activity, therefore, was not prohibited by Section 8(b)(4)(B) of the Act | 13   |
| II. Local 113's action in assisting Local 22 to enforce the work preservation clause of its agreement was primary and outside the scope of Section 8(b)(4)(B), although Local 113 was not a party to that agreement  | 22   |
| Conclusion   | 30   |
| Appendix   | 31   |



## CITATIONS

### Cases:

|  |            |
|--|------------|
| <i>International Ass'n of Heat and Frost Insulators and Asbestos Workers and Local 125 (Insul-Coastic Corp.)</i> , 139 NLRB 659                                | Page<br>20 |
| <i>International Ass'n of Heat and Frost Insulators and Asbestos Workers and Local 24 (Speed-Line Mfg. Co.)</i> , 137 NLRB 1410                                | 20         |
| <i>International Ass'n of Heat and Frost Insulators and Asbestos Workers and Local 2 (Speed-Line Mfg. Co. and Fibrous Glass Products, Inc.)</i> , 139 NLRB 688 | 20         |
| <i>Local 761, Electrical Workers v. National Labor Relations Board</i> , 366 U.S. 667  | 16, 23     |
| <i>Local 22, Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers, (Mundet Cork Co.)</i> , 150 NLRB 1626  | 21         |
| <i>Milwaukee Plywood Co. v. National Labor Relations Board</i> , 285 F. 2d 325   | 28         |
| <i>National Labor Relations Board v. General Drivers, Local 968 (Otis Massey Co.)</i> , 225 F. 2d 205, certiorari denied, 350 U.S. 914                         | 27, 28     |
| <i>National Labor Relations Board v. National Woodwork Manufacturers Ass'n</i> , No. 111, this Term  | 10         |
| <i>National Woodwork Manufacturers Ass'n v. National Labor Relations Board</i> , No. 110, this Term  | 11         |
| <i>Potter v. International Ass'n of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, et al. (S.D. Tex. Houston Div., Civil No. 63-H-452)</i>           | 8          |
| <i>United Ass'n of Journeymen, Local 106 (Columbia-Southern Chemical Corp.)</i> , 110 NLRB 206   | 28         |
| <i>Universal Camera Corp. v. National Labor Relations Board</i> , 340 U.S. 474   | 14, 16     |

### Statute involved:

|   |              |
|---|--------------|
| <i>National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 et seq.)</i> | 3, 31        |
| Section 7   | 24, 31       |
| Section 8(b)(4)(B)  | 3,           |
| 8, 11, 12, 13, 16, 21, 22, 26, 27, 28, 29, 31   |              |
| Section 8(e)  | 2, 9, 11, 32 |



**In the Supreme Court of the United States**

**OCTOBER TERM, 1966**

---

**No. 206**

**HOUSTON INSULATION CONTRACTORS ASSOCIATION,  
PETITIONER**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

---

**No. 413**

**NATIONAL LABOR RELATIONS BOARD, PETITIONER**

**v.**

**HOUSTON INSULATION CONTRACTORS ASSOCIATION**

---

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FIFTH CIRCUIT**

---

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

---

**OPINIONS BELOW**

The opinion of the court of appeals (R. 232-242) is reported at 357 F. 2d 182. The Board's decision and order (R. 176-191; 197-204) are reported at 148 NLRB 866.

**JURISDICTION**

The judgment of the court of appeals was rendered on March 9, 1966, and a decree was entered on

March 31, 1966 (R. 232, 243). On June 8, 1966, Mr. Justice Black extended the Board's time for filing a petition for certiorari to and including August 6, 1966 (R. 245). The Association's petition for certiorari (No. 206) was filed on June 6, 1966, and the Board's petition (No. 413) was filed on August 4, 1966. On October 10, 1966, both petitions were granted (R. 245-246). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

#### QUESTIONS PRESENTED

A group of employers and a union have a collective bargaining agreement which contains a clause prohibiting the employers from contracting out work ordinarily performed by their employees. In violation of the agreement, two employers purchase products incorporating such work, and their employees are induced to refuse to handle these products—in one case, by the union which is a party to the agreement, and in the other, by a sister local, which is not a party to the agreement. The questions presented in No. 206 are as follows:<sup>1</sup>

1. Whether a clause in a collective bargaining agreement prohibiting an employer from contracting out work ordinarily performed by his employees is outside the reach of Section 8(e) of the National Labor Relations Act (which bans "hot cargo" and other types of secondary agreements), since a work preservation clause which is primary in nature.

<sup>1</sup>By agreement of the parties, each will file a single brief directed to the issues presented in both Nos. 206 and 413.

2. Whether substantial evidence supports the Board's finding that the unions' objective in inducing the employee refusals was to enforce such lawful work preservation clause.

3. Whether the inducement of such refusals by the union which is a party to the agreement is outside the ambit of Section 8(b)(4)(B) of the Act (which proscribes only secondary activity), since directed toward enforcement of a lawful work preservation clause.

No. 413 presents this further question:

4. Whether the inducement of such refusals by the union not a party to the agreement is similarly not banned by Section 8(b)(4)(B), where that union represents other employees of the same employer, where its only dispute is with that employer and no pressure is exerted against third parties, and where its objective is merely to aid the contracting union in enforcing a lawful work preservation clause of its agreement.

#### STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*), are set forth in the Appendix, *infra*, pp. 31-33.

#### STATEMENT

##### A. THE BOARD'S FINDINGS OF FACT

1. **Houston Insulation Contractors Association** (hereinafter "Association"), a group of contractors in the Houston area, bargains on a joint basis and has a collective bargaining agreement with Local 22 of the International Association of Heat and Frost In-

ulators and Asbestos Workers, AFL-CIO (R. 179; 31). Johns-Manville Sales Corporation and Armstrong Contracting and Supply Corporation are members of the Association and signatories to the agreement (R. 179; 31). That agreement provides, in pertinent part (R. 179-180; 136, 142):

#### ARTICLE VI

The Employer agrees that he will not sublet or contract out any work described in Article XIII \* \* \*

#### ARTICLE XIII

The Agreement covers the rates of pay rules and working conditions of all Mechanics and Improvers engaged in the preparation, distribution and application of pipe and boiler coverings, insulation of hot surfaces, ducts, flues, etc., also the covering of cold piping and circular tanks connected with the same and all other work included in the trade jurisdictional claims of the Union.

This to include alterations and repairing of work similar to the above and the use of all materials for the purpose mentioned.

2. Over a period of years, Johns-Manville had purchased from Techalloy Company stainless steel bands and other materials for use in installing insulation materials (R. 182; 38; 11-12). In the past, Techalloy had delivered coils or rolls of wire to Johns-Manville. Bands were then cut to size by Johns-Manville employees, represented by Local 22, and used to fasten



insulation material to pipes (R. 199-200; 14-15; 60; 104-105).

In July 1963, Johns-Manville was engaged in a construction project for an oil company at Texas City, Texas. In connection with the performance of its contract, Johns-Manville purchased from Techalloy bands which had been pre-cut to specification by Techalloy employees (R. 182, 200; 12-13). When the pre-cut bands were delivered to the Johns-Man-

ville's job site foreman and a member of Local 22, instructed an employee not to work on the bands, as they lacked the identifying labels or decals which would have been affixed had the cutting been done by employees in the Johns-Manville shop (R. 60).<sup>\*</sup> Shrode also informed David, Johns-Manville's job site foreman and a member of Local 22, that he had heard that the bands were pre-cut, and he instructed David not to install bands which did not bear identifying labels (R. 183; 62; 71-72). When David went to the job site at Texas City he found that the bands bore no labels. Concluding, therefore, that they could not have been cut by Johns-Manville employees, he told Roberts, contract manager for Johns-Manville, that the bands would not be installed. Roberts then called Shrode, who confirmed David's refusal (R. 62-63; 64-65). While Techalloy was a non-union employer (R. 13), Local 22 had never before protested the use of Techalloy

<sup>\*</sup>These decals, which were distributed by the unions involved here, were gummed so that they could be affixed to insulation products, and bore a number identifying the shop where the material was finished (R. 180, n. 3). See the discussion *infra*, pp. 17-20.



products; nor did it refuse on this very project to install Techalloy products which had not been pre-cut (R. 260; 61; 86-87).

3. Local 113 of the International Association of Heat and Frost Insulators and Asbestos Workers represents insulation employees in Victoria, Texas, where Armstrong had the insulation contract in connection with the construction of an ammonia plant.\* In the initial stages of this project, Armstrong, as was its customary practice, purchased straight lengths of asbestos materials from Thorpe Products Company (R. 200; 39, 44). These straight lengths were traditionally cut to make mitered fittings\* by Armstrong employees in Houston—members of Local 22—and were then installed by Armstrong employees at the job site—in this instance members of Local 113. Cutting the straight lengths to size was work which Armstrong employees had performed in the past, and which Local 22 claimed for its Houston employees by virtue of the no-subcontracting provision of its collective bargaining agreement (R. 220; 35; 38-39; 49-50).\*

\*Local 22 represents Armstrong's employees in Houston and Texas City, Texas.

\*A mitered fitting is "an insulation item that is used to cover something other than a straight piece of pipe in a pipe line, and this is made by taking standard insulation pipe covering and cutting it on a bias or miter and then gluing it together or sticking it together so that it will conform to the fitting that you are trying to shape it to" (R. 5).

\*The agreement between Local 22 and the Association also provided that member insulation contractors, when operating outside the Local's jurisdiction, should "abide by the rates of pay, rules and working conditions established by collective

In July 1963, Graham, foreman of the insulation work at the Victoria project and a member of Local 113, called Foster, branch manager for Armstrong, and informed him that certain mitered fittings would not be installed by members of Local 113, as they bore no identifying labels (R. 180; 22). Foster consulted Eaton, business agent of Local 113, who informed Armstrong's representatives that the fittings would not be installed unless he received assurance that the work performed on them had been done by Armstrong shop employees in Houston (R. 182, 201; 108-110). In response to Eaton's request for "proof" that Armstrong's Houston employees had performed the work, a letter was sent to Eaton by Lunda, Armstrong's District Manager. The letter contained the requested assurance (R. 116-117), and the fittings were apparently applied (R. 181-182; 201; 110).\*

In early August 1963, Armstrong, for the first time, purchased from Thorpe fittings on which the bargaining agreements between the [local] insulation contractors and the local union in that jurisdiction." Local 113's collective bargaining agreement, in turn, contained a ban on subcontracting identical to that in Local 22's agreement with the Association (R. 700; 132-133; 62).

\* This material arrived at the job site without labels because the Association had previously taken the position that the union's labeling system could not be used in shops of member contractors. A meeting between representatives of Local 22 and the Association was held on June 8 to discuss this problem, at which Baker, secretary of Local 22, explained that the union was not "married to the decal" but that it was the best means of identifying the contractor who had performed fabrication work on manufactured products (R. 46-47; 91-93). Nevertheless, the Association sought to prohibit labeling in its shops, but apparently changed its mind after several work stoppages (R. 181, n. 5).

mitering work customarily done by Armstrong employees had already been performed by Thorpe (R. 200; 6; 54-55). These fittings arrived at the job site without the identifying labels which would have shown that the mitering had been done by Armstrong's Houston employees. As in July, Local 113 instructed Armstrong's jobsite employees to refuse to install these fittings because they bore no identifying labels (R. 181-182; 201; 53, 54).<sup>7</sup> Although Thorpe was a non-union employer, Local 113 had not in the past protested the use of Thorpe products (R. 36; 6).

#### B. THE BOARD'S CONCLUSIONS AND ORDER

On these facts, the Board concluded that Locals 22 and 113 had refused to install the pre-cut and mitered products of Techalloy and Thorpe, not because they were manufactured under non-union conditions, but because the use of those prefabricated products deprived Johns-Manville and Armstrong employees of work they had customarily performed and which they claimed under the no-subcontracting provision in Local 22's agreement with the Association. The Board held that the unions' inducement of the Johns-Manville and Armstrong employees was thus lawful primary activity—not secondary activity proscribed by Section 8(b)(4)(B) of the Act.<sup>8</sup> Accordingly, it

<sup>7</sup> The fittings were installed on September 16, 1963, when an injunction in this case was obtained pursuant to Section 10(f) of the Act. *Potter v. International Ass'n of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, et al.* (S.D. Tex., Houston Div., Civil No. 63-H-452) (R. 181).

<sup>8</sup> The Trial Examiner assumed that "this was not a boycott of non-union products" (R. 184). But he found the provision upon which the unions had based their demand that the



dismissed the unfair labor practice complaint (R. 201-203).\*

### C. THE DECISION OF THE COURT OF APPEALS

The court of appeals, finding that the no-subcontracting clause of the pertinent collective bargaining agreement was intended to preserve for the employees covered by the agreement work which they had traditionally performed, held that such clause did not violate Section 8(e) of the Act, since that provision was only applicable to so-called "hot cargo" and similar clauses which have a secondary objective (R. 240-241). The court further found that substantial evidence supported the Board's finding that the

products not be used at the job site unlawful under Section 8 (e), since not within the construction industry proviso (or exemption) to that section. Stating that "the exemption to Section 8(e) applies only to work to be done at the jobsite," the Examiner concluded that it did not privilege the unions' action since the "mitering and cutting even when performed by Armstrong and Johns-Manville employees, was performed at their shops and not at the jobsite" (R. 185). In so concluding the Examiner regarded the provision in question as one "clearly \* \* \* aimed at the exemption of Section 8(e) \* \* \*" (R. 186). The Board reversed the Examiner's finding of unfair labor practices (R. 198), and, in so doing, regarded the construction industry proviso as wholly irrelevant. As we show (see note 11, *infra*), the Examiner's premise that the proviso has applicability here is erroneous.

\*The Board's General Counsel had issued a complaint against Locals 22 and 113 and the International with which they were affiliated. Board Member Leedom, dissenting in part, agreed with the majority that the complaints against the International and Local 22 should be dismissed, but would have found a violation of the Act on the part of Local 113. Member Leedom considered controlling the fact that Local 113 sought to protect work not for its own members but for employees represented by Local 22 (R. 203-204).

unions' objective in inducing the employees of Johns-Manville and Armstrong not to handle certain products of Techalloy and Thorpe was to preserve work for the employees covered by the agreement, and not to put pressure on Techalloy and Thorpe because they were non-union employers (R. 237-240). The court therefore concluded that Local 22's attempt to enforce the no-subcontracting clause was not secondary activity proscribed by Section 8(b)(4)(B) of the Act, and accordingly sustained the Board's dismissal of the complaint against Local 22 (R. 241).

But the court of appeals held that the Board had erred in dismissing the complaint against Local 113 (R. 241-242). Since that union was neither a party to Local 22's agreement nor attempting to preserve work for its members, Local 113 had, in the view of the court, an insufficient interest to justify its work stoppage, which necessarily had an impact on the supplier of the prefabricated materials (Thorpe). The court remanded the case to the Board for the entry of an appropriate order against Local 113, and for consideration of whether the International had participated in Local 113's work stoppage, a question not decided by the Board since it dismissed the complaint (R. 243).

#### SUMMARY OF ARGUMENT

The agreement between the Association and Local 22 contained a clause prohibiting the contracting out of work ordinarily performed by the employees covered by the agreement. Such a work preservation clause does not violate Section 8(e) of the Act. As shown in our brief in *National Labor Relations Board*



v. *National Woodwork Manufacturers Ass'n*, No. 111, this Term,<sup>10</sup> Section 8(e) was intended to encompass "hot cargo" and other similar clauses which have a "secondary" objective, i.e., where the union has no dispute with the contracting employer, but uses the agreement with him as a device for exerting pressure on some other employer; it was not designed to interdict work preservation clauses that are "primary" in nature, i.e., whose objective is not to put pressure on some other employer, but to protect the terms and conditions of employment of the contracting employer's own employees. Accordingly, the court of appeals correctly concluded that the no-subcontracting clause in the Local 22-Association agreement was not unlawful under Section 8(e).<sup>11</sup>

Similarly, the objective of Local 22 and Local 113, in inducing the employees of Johns-Manville and Armstrong (who were both parties to the Association agreement) to refuse to handle products which had been worked on in violation of the work preservation clause of that agreement, was lawful. We show in our brief in *National Woodwork Manufacturers Ass'n v. National Labor Relations Board*, No. 110, this Term,

<sup>10</sup> Copies of the Board's briefs in No. 111, and in the companion case, No. 110, have been served on counsel for the Association.

<sup>11</sup> The Association's basic position (Pet. No. 206, 10-12) is that, since the clause was not limited to work to be performed on the job site (but would also encompass work performed in the employers' shops), it exceeded the terms of the construction industry proviso to Section 8(e). However, as the court of appeals properly held (R. 240-241), and as we show in our brief in No. 111 (pp. 32-36), since a work preservation clause of the type here is not within Section 8(e) to begin with, it is irrelevant that it does not satisfy the terms of the proviso.

that Section 8(b)(4)(B) of the Act, like Section 8(e) with respect to agreements, proscribes only secondary, and not primary, activity. We further show there that, where, in the circumstances here, a union which has a lawful work preservation agreement brings pressure to bear against an employer who is a party to that agreement for the purpose of enforcing the agreement, the union action is primary and does not violate Section 8(b)(4)(B). Accordingly, since, as shown below, the court of appeals correctly concluded that substantial evidence supports the Board's finding that Local 22 and Local 113, in inducing the employee refusals, were merely seeking to enforce the work preservation cause of Local 22's agreement with the employers, and not to exert pressure on any third parties, the Board's dismissal of the complaint against Local 22, upheld by the court of appeals, was proper.

## II

Contrary to the view of the court of appeals, the action of Local 113, in aiding Local 22 to enforce its work preservation clause against Armstrong was likewise primary activity, and thus outside the ban of Section 8(b)(4)(B), although Local 113 was not a party to the Local 22-Association agreement. Employees of Armstrong were represented both by Local 22 and by Local 113. Under the Local 22-Association agreement Armstrong agreed, when performing work outside Local 22's geographical jurisdiction, to abide by the existing rules and conditions of employment established by collective bargaining agreements between the insulation contractors and the sister locals

having territorial jurisdiction in the particular area. Local 113's agreement with contractors within its territorial jurisdiction contained an absolute ban on subcontracting identical to that contained in the Local 22-Association agreement. Local 113's refusal, just like Local 22's, was aimed solely at Armstrong and was directed simply toward preserving for Armstrong's employees work which they had traditionally performed. Since Local 113 had no secondary objective, its activity was lawful under Section 8(b) (4) (B).

#### ARGUMENT

**I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE UNIONS' OBJECTIVE, IN INDUCING THE REFUSALS TO INSTALL CERTAIN PREFABRICATED MATERIALS, WAS A PRIMARY AND THEREFORE LAWFUL ONE—TO PRESERVE WORK FOR THE EMPLOYEES COVERED BY LOCAL 22'S AGREEMENT WITH THE EMPLOYERS—AND WAS NOT DIRECTED AGAINST NON-UNION PRODUCTS OR OTHERWISE SECONDARY IN NATURE; THAT ACTIVITY, THEREFORE, WAS NOT PROHIBITED BY SECTION (8) (b) (4) (B) OF THE ACT**

The Board found that the objective of Local 22 and Local 113, in inducing the employees of Johns-Manville and Armstrong to refuse to install the prefabricated Techalloy and Thorpe products, was to preserve work for the employees covered by Local 22's agreement with the insulation contractors, pursuant to the no-subcontracting clause of that agreement—not to boycott those products because they were non-union (R. 201, 184). Substantial evidence on the whole record supports this finding, and therefore, contrary to the Association's contention (Pet. No. 206,

13-14), the court of appeals correctly sustained that finding."

Thus, Armstrong Branch Manager Foster testified that Thorpe previously supplied straight-lined pipe covering which, after it had been mitered by Armstrong employees, had been installed by other employees of that company (R. 35, 39, 40). Further, he testified that the only occasion on which Armstrong employees had refused to install Thorpe products was when Thorpe supplied mitered fittings—fittings on which the work preparatory to installation had been performed by Thorpe, rather than Armstrong, employees (R. 36; 39-40). Similarly, it was admitted by Johns-Manville Contract Manager Roberts that, when Techalloy bands had been brought to the job site in coils and cut by Johns-Manville employees, there was no objection to the use of these bands by the union; the only objection occurred when Johns-Manville sought to use pre-cut bands which it had obtained from Techalloy (R. 68). The same admission was made by Techalloy Sales Manager Cook (R. 14-15).

It is plain from this testimony that the reason for the unions' refusal to install Thorpe mitered fittings and Techalloy pre-cut bands was not because Thorpe

"As this Court pointed out in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488, the requirement that the reviewing court canvass the "whole record" does not mean that it "may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." As shown below, the Board's factual conclusions were reasonable, and therefore the court below properly applied the *Universal Camera* standard in upholding them.

whole record supports this finding, and therefore con-  
 try to the Association's contention (Pet. No. 206,



and Techalloy were non-union manufacturers, but because the use of *mitered* fittings and *pre-cut* bands deprived Armstrong and Johns-Manville employees of prefabrication work customarily performed by them. As properly found by the Board, the unions' objective underlying these refusals was a lawful one; since a lawful clause of the agreement between Local 22 and the two employers barred the contracting out of such work, the unions had a legitimate, primary dispute with those employers.

The other factors relied on by the Association do not require a contrary conclusion:

1. Baker, an officer of Local 22 and vice-president of the International, initially testified that he had instructed the men not to handle the products of Thorpe and Techalloy because "we are not in agreement with Thorpe or Techalloy" (R. 79). The Association contends that this reveals that the unions were opposed to those products because they were non-union. But, as the court below correctly concluded (R. 237-238), "the Board was not required as a matter of law to accept [this] statement as gospel in the face of ample testimony, including later testimony by Baker himself," to the effect that the unions objective was work preservation and in the face of the undisputed testimony that although Thorpe and Techalloy were non-union employers, neither local

<sup>14</sup> Baker further testified (R. 87) that the only time Local 22 refused to handle Techalloy products was when they were prefabricated. He also stated that the union had refused to handle prefabricated fittings when they arrived on a job being performed by Industrial Insulators (R. 84-86; see *infra*, p. 19).



union had ever protested the use or application of any of their other products purchased by Johns-Manville or Armstrong but only protested the pre-cut bands and pre-mitered fittings."

Nor does the conclusion that Baker's earlier testimony is outweighed by his later testimony and the other evidence in the record ignore the fact that Section 8(b)(4)(B) applies so long as "an object" of the union's conduct is secondary (see Pet. No. 206, 13-14). Accepting this conclusion, as proper application of the *Universal Camera* standard requires (see note 12, *supra*), this is not a case where the union had two objects, one lawful and the other unlawful. Under the Board's finding, sustained by the court below, Baker's testimony as a whole revealed only a single, primary object, i.e., work preservation."

"As the court below added (R. 238): "It may well be that the union officials hoped and expected \* \* \* that a result of their members' refusal to use and apply the [prefabricated] bands and fittings [would be] to put pressure on Techalloy and Thorpe as nonunion employers. But hopes and expectations do not necessarily constitute 'objects'. An illegal 'object' is something more than the result, even an inevitable result, of a work stoppage for a legitimate reason. Otherwise the right to strike would for practical purposes be nullified, a result which Congress clearly did not intend." See *Local 761, Electric Workers v. National Labor Relations Board*, 366 U.S. 667, 672-673; Bd. Br. in No. 110, pp. 14-15, n. 10.

The Association also argued in the court below that the Board's finding that the unions' object was work preservation was "incongruous", in view of the testimony that they had installed prefabricated materials without complaint on other occasions. But the testimony on which the Association relied was either contradicted or inconclusive. Thus, while Foster, of Armstrong, testified that Armstrong had purchased prefabricated fittings from Thorpe on previous occasions (R. 44-45), he did not testify about the union's reaction to this. Further-

2. The fact that the unions refused to install prefabricated materials unless they bore identifying labels likewise does not undermine the Board's finding that the unions had a work preservation objective. As the court below noted (R. 238): "The use of decals is in itself a neutral fact. The decals could be used as a means of boycotting non-union goods or they could be used as a means of policing the ban on subcontracting. There is ample testimony in the record to support the conclusion that in this case the decals were used to police the ban on subcontracting."

Thus, the facts show that Johns-Manville and Armstrong had an agreement with Local 22 which provided in effect that the work of cutting or fitting to size or shape certain manufactured products, in order to meet the specifications of a particular job, would be done by their employees. Both of these employers had employees at their shops in Houston as well as at the various job sites, and this cutting and fitting work was generally carried on in the shops.<sup>15</sup> In

more, Thorpe President Sheldon and Armstrong Victoria Project Superintendent Williams contradicted this testimony (R. 55). Similarly, the testimony of Johns-Manville Contract Manager Roberts that his employees had used pre-cut aluminum bands in the past (R. 63, 67) was weakened by his further testimony (R. 67-68) that he did not know whether the union was aware of this fact. Moreover, Local 22 Business Agent Shrode testified that the union had not known of the use of pre-cut aluminum bands, and that, had it known, it would have objected (R. 106).

<sup>15</sup> The work involved in the Armstrong dispute, for example, was customarily performed in Armstrong's Houston shop, since the saw used in cutting the insulation material to the proper "L" shape was too large and expensive to be readily transferred to the job site (R. 49).

order to police the no-subcontracting provisions, the Johns-Manville and Armstrong jobsite employees who were to install the products in question had to be able to ascertain whether the labor performed on these products had been performed by shop employees of those companies, or by employees of some other employer.

The unions solved this problem by utilizing labels (or decals) numbered serially, which they delivered to the shops.<sup>19</sup> When work was performed on a manufactured product in the shop, either the shop employee who did the work or some other designated individual affixed a label to that product before it was sent to the job site (R. 89-90). When a prefabricated product was delivered to the job site, the foreman called the business agent and gave him the label number (R. 73). Since the business agent kept a record of which numbered labels came from which shops, he could tell the foreman whether the prefabrication work had been done in his own employer's shop or had been subcontracted to some other employer.

Labels were delivered only to the shops of insulation contractors who were members of the Association and thus parties to the agreement with the union, and who were therefore bound by the no-subcontracting clause (R. 97-98). Significantly, the label alone did not authorize the jobsite employees to install the product. They first had to ascertain, by checking the number on the label, in what particular shop the prefabrication work had been performed (R. 90-91). If

<sup>19</sup> The labels, which were gummed, came in rolls like stamps and were backed by waxed paper which was removed when the label was affixed to a product (R. 88-89).

the work had been performed by the shop employees of some employer other than their own, the jobsite employees would not handle those products even though the prefabrication had been performed in a unionized shop. Indeed, when prefabricated fittings were brought to the job site of Industrial Insulators, an employer covered by the agreement with Local 22, its employees were instructed not to install the fittings *despite the fact that they bore a label*. There the serial number showed that the prefabrication work had been performed by employees of a contractor, albeit a unionized contractor, other than Industrial Insulators (R. 89-86). Similarly, it is undisputed that premolded fittings were installed by Armstrong employees *despite the absence of labels*, since the work performed thereon was beyond the capabilities of that company's employees (R. 36-37: 56).<sup>17</sup>

In short, the record shows that the presence or absence of a decal on a product was not the crucial factor in the unions' decision whether to handle that product—as it would have been if the purpose of the labeling system were simply to boycott non-union products. Rather, the relevant factor was whether the products embodied work traditionally performed by the employees covered by Local 22's contract. Hence, products with decals were not installed if the prefabrication work had in fact been subcontracted;

<sup>17</sup>In this regard, see the pertinent distinction made by the court below (R. 239) between work within the capacity of a contractor's employees and work beyond the skills and never performed by such employees, in defining the scope of union action properly justifiable pursuant to a valid work preservation clause; see also note 18, *infra*.



and products *without* decals *were* installed if it could otherwise be determined that no prefabrication work had been subcontracted. Decals were simply a convenient way of ascertaining, in the usual case, whether shop employees had performed the prefabrication work which, under the work preservation clause of the Local 22-Association agreement, they were entitled to perform.

3. Finally, the Board's finding that the unions' objective here was simply work preservation is not inconsistent with the fact that, in other cases involving the same International Union and various of its locals, the Board had found a secondary object. These cases are clearly distinguishable, for the reasons given by the court below (R. 239-240).<sup>18</sup>

<sup>18</sup> Three of the cases—*International Ass'n of Heat and Frost Insulators and Asbestos Workers and Local 24 (Speed-Line Mfg. Co.)*, 137 NLRB 1410; *International Ass'n of Heat and Frost Insulators and Asbestos Workers and Local 125 (Insul-Coustic Corp.)*, 139 NLRB 659; and *International Ass'n of Heat and Frost Insulators and Asbestos Workers and Local 2 (Speed-Line Mfg. Co. and Fibrous Glass Products, Inc.)*, 139 NLRB 688—involved "premolded" fittings, not "prefabricated" ones, as were involved here. As the court below noted (R. 239): "The distinction \* \* \* is crucial, for prefabricated fittings are essentially hand made and \* \* \* customarily had been prepared by members of International's local unions, whereas premolded fittings are factory made with the use of heat and heavy machinery to produce curved or "L" shaped insulation \* \* \*. Thus, in the cases cited above the Board quite reasonably concluded that in objecting to the use of premolded fittings the unions were not in fact seeking to obtain work claimable under their contracts but instead were objecting to the non-union status of the manufacturers of the premolded fittings." Moreover, in each of those cases, unlike here, there was ample evidence that the union objected to the use of premolded fittings simply because they were not union made. See

In sum, substantial evidence supports the Board's finding that the unions' objective, in inducing the refusals to handle the Techalloy and Thorpe products, was to preserve work for the employees covered by Local 22's agreement with Johns-Manville and Armstrong, in accordance with the no-subcontracting clause of that agreement. Hence, the action by Local 22 was clearly primary, and, under the analysis developed more fully in our brief in No. 110 (pp. 8-15), was thus outside the ban of Section 8(b)(4) (B) of the Act. As shown hereafter, the same conclusion holds true for the action of Local 113.

137 NLRB at 1411, 1413; 139 NLRB at 689-690; 139 NLRB at 660.

The more recent case of *Local 22, Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers (Mundet Cork Co.)*, 150 NLRB 1626, is also distinguishable on its facts. There the union, after initially refusing to install aluminum jacketing not bearing a union decal for an insulation contractor (Mundet), agreed to do so when it learned that the jacketing had been cut to size and prefabricated by a Johns-Manville employee represented by the union (150 NLRB at 1633). The union never protested that Mundet was depriving its own employees of work (*ibid.*). Furthermore, the Board found that the particular jacketing had not in the past been fabricated by Mundet's employees and that Mundet did not even have the equipment for its fabrication (*ibid.*). In light of these findings, the court below properly concluded (R. 240) that there was no inconsistency between the Board's holding here and its holding in *Mundet* that the union's objective in initially refusing to install the unlabeled jacketing was not to preserve work for Mundet's employees, but rather to insure that the product was made by union employees.

II. LOCAL 113'S ACTION IN ASSISTING LOCAL 22 TO ENFORCE THE WORK-PRESERVATION CLAUSE OF ITS AGREEMENT WAS PRIMARY AND OUTSIDE THE SCOPE OF SECTION 8(b)(4)(B), ALTHOUGH LOCAL 113 WAS NOT A PARTY TO THAT AGREEMENT

Section 8(b)(4)(B) of the Act bars a union from exerting pressure against a neutral, "secondary" employer, for the purpose of forcing him to cease doing business with the employer with whom the union has a dispute or otherwise disfavours. A proviso to that section expressly permits "any primary strike or primary picketing."<sup>12</sup> Assuming—as the court below found—that the no-subcontracting clause in Local 22's agreement with the Association had the lawful, primary objective of preserving work for those Armstrong employees who were represented by Local 22, a refusal to install prefabricated materials by those employees, in the event Armstrong breached the agreement, would not, in the circumstances here, violate Section 8(b)(4)(B). Yet, at the same time, the court below held that an identical refusal to perform work by members of another union—Local 113—representing other Armstrong employees, though intended only to assist in securing enforcement of their fellow employees' lawful agreement, was secondary and thus violated the Act.

The court reasoned that, since Local 113 was not seeking to obtain work for the employees it represented, and was not a party to Armstrong's agreement with Local 22, its interest was "too weak" to privilege

<sup>12</sup>See Bd. Br. in No. 110, p. 9, n. 4, for a discussion of the effect of this proviso.

its refusal to work, which necessarily had an impact on Thorpe, the employer from whom Armstrong purchased the prefabricated materials (R. 241-243). But if Local 113 was engaged in legitimate, primary activity, it is irrelevant that an incidental effect of that activity may have been to put pressure on Armstrong to cease doing business with Thorpe (see *Local 761, Electrical Workers v. National Labor Relations Board*, 366 U.S. 667, 673-674); and, on the critical issue of whether the activity was primary or secondary, it is not dispositive that Local 113 neither was seeking to preserve work for its own members nor was a party to Local 22's agreement.

The correct test, we submit, is whether the refusal to work was directed at the employer with whom Local 113 had a dispute or whether its actual objective was to conscript that employer in a campaign directed at a third party. Plainly, it was the former. There was no dispute with the third party, Thorpe, the supplier of the prefabricated materials, although Thorpe may incidentally have been affected." The dispute was with Armstrong, and Local 113 limited its activity to Armstrong employees at their job site. Indeed, in view of the common economic interest among all employees working for the same employer, Local 113's work stoppage was a classic instance of "concerted activities for . . . mutual aid or protection," which

"Nor was there any dispute with, or purpose of exerting pressure on, the owners of the construction projects. Cf. *Bd. Br. in No. 110*, p. 17. Here there was no evidence of any desire on the part of the project owners in regard to the use of prefabricated materials.



are protected by Section 7 of the National Labor Relations Act (App., *infra*, p. 31).<sup>20a</sup>

Local 113 represented some of Armstrong's employees, as did Local 22. The activity of each union was designed to protect and preserve the contractual rights of certain of Armstrong's employees—those at the Houston shop who were members of Local 22. That the work of the particular employees represented by Local 113 was not involved is irrelevant in determining whether that union's activity was primary or secondary. Under the Local 22-Association agreement Armstrong agreed, when performing work outside Local 22's geographical jurisdiction, to abide by the existing rules and conditions of employment established by collective bargaining agreements between the insulation contractors and the sister locals in the particular area (see note 5, *supra*). Local 113's agreement with contractors within its territorial jurisdiction contained an absolute prohibition on subcontracting of work traditionally performed by its members identical to that contained in the Local 22-Association agreement. Local 113's refusal to install prefabricated materials, just like Local 22's, was directed toward preserving for Armstrong employees work which they had traditionally performed. In other words, some employees of Armstrong sought to assist other employees of the same company in effectuating rights which they had bargained for and to which they were entitled under the pertinent collective bargain-

<sup>20a</sup> Thus, had Local 22 and Local 113 represented different bargaining units in an industrial plant, it would seem clear that Local 113 (absent a restriction in its agreement in this regard) could lawfully support a strike called by Local 22 (see n. 24, *infra*).

ing agreement. That Local 113 was not a party to the Local 22-Association agreement does not automatically make its activity secondary. Its objective was still primary in nature, and indeed was identical to Local 22's.

There is no need to indulge in any third-party beneficiary or agency analysis.<sup>21</sup> It is enough to say, as did the Board, that employees of Local 113 could lawfully insist that Armstrong abide by and adhere to the no-subcontracting clause of the Local 22-Association agreement. In other words, some of Armstrong's employees could properly seek to require their employer to live up to a valid agreement which had as its objective the preservation for fellow employees of work which they had traditionally performed for Armstrong. Under the circumstances here, the contractual right of Armstrong's Houston shop employees might otherwise be rendered nugatory. Indeed, the rather formalistic approach of the court below on this question would result in an anomalous situation—had both the shop employees and the jobsite employees been members of Local 113, or had both groups been represented by Local 22, the court below would have found the refusal by the jobsite employees to

<sup>21</sup> Although the Board in its majority opinion made passing mention of third-party beneficiary and agency concepts (R. 202, n. 7), it is not at all clear, contrary to the apparent view of the court below (R. 242), that the Board grounded its decision on this point on either or both of those concepts. Rather, the Board simply stated that Local 113 "had the right to insist \* \* \* that Armstrong adhere to the lawful no-subcontracting clause" of the Local 22-Association agreement, and that "Armstrong had thus violated the no-subcontracting clause of its contract and Local 113's conduct was therefore lawful" (R. 202, n. 7).

perform lawful and outside Section 8(b)(4)(B); it reached a different conclusion solely because each group happened to be represented by a different local.

As noted earlier, the parties attempted to provide for a circumstance such as here presented in their collective bargaining agreement. Armstrong agreed to abide by the provisions of the pertinent agreements in areas within the territorial jurisdiction of other locals, and, as mentioned, Local 113's agreement contained a ban on subcontracting identical to that in the Local 22-Association agreement. Armstrong should not be permitted to negate the rights bargained for by the parties to this agreement because of the fortuitous circumstance that its jobsite employees were members of a different local from that of which its shop employees were members, particularly where the parties attempted to provide for this situation in the agreement preserving work for the shop employees."

In our view, it is simply incorrect to conclude that members of Local 113 *could not* have had a dispute with their employer over a matter affecting other em-

"Contrary to the view of the court below (R. 242), Local 113 had more than just an "emotional interest" in assisting Local 22 in enforcing the work preservation clause of its agreement with Armstrong. Local 113's members had a real, though perhaps indirect, "economic interest," in coming to the aid of their fellow employees. Local 113 had an identical ban on subcontracting in its agreement, the viability of which it had a substantial interest in protecting. If the employer of Local 113's members could disregard with impunity a similar no-subcontracting restriction protecting other employees who were members of a sister local, Local 113 might be adversely affected when and if it should attempt to assert and rely upon the restriction in its own agreement. Local 113's interest in the matter thus had significant economic underpinnings.

employees of that employer. Local 113 *did* have a legitimate dispute with Armstrong—over its failure to abide by its agreement to preserve work traditionally performed by fellow employees who were members of Local 22. Wholly apart from Local 113's indirect economic interest in the matter (see note 22, *supra*), it could properly come to the aid of its members' fellow employees—a union does not have to act selfishly to act lawfully.

Properly considered, Section 8(b)(4)(B) is directed at the situation where a union exerts pressure on one employer in order to further a dispute with another employer or because it otherwise disfavors such other employer. That section was not intended by Congress to reach the converse situation where two unions have a dispute with a single employer and seek to exert pressure on that, and no other, employer. Indeed, in several cases involving analogous situations, the Fifth and Seventh Circuits have applied this principle. In *National Labor Relations Board v. General Drivers, Local 968 (Otis Massey Co.)*, 225 F. 2d 205 (C.A. 5), certiorari denied, 350 U.S. 914, the court of appeals held that the union representing Otis Massey's warehousemen and truck drivers had not exceeded the bounds of legitimate primary activity when, in furtherance of a dispute with Otis Massey involving the latter employees, it picketed the project where Otis Massey's construction employees, who were represented by other unions, were at work. The court emphasized that a contrary ruling would isolate "other employees of that same primary employer from exercising their statutory right under Section 7 . . . to



engage in mutual aid and protection and make common cause with their co-workers" (225 F. 2d at 210).<sup>22</sup> Similarly, in *Milwaukee Plywood Co. v. National Labor Relations Board*, 285 F. 2d 325 (C.A. 7), a union which represented the employees of a parent company, in furtherance of a dispute with that company, picketed a subsidiary located in another city. The relationship between the two companies was sufficiently close to make them one employer. A second union, representing the employees of truckers making deliveries to the subsidiary, joined the picket line and induced a stoppage of deliveries. The Seventh Circuit upheld the Board's finding that the second union, by thus aiding the first, had not exceeded the bounds of lawful primary activity.<sup>23</sup> Consistent with these deci-

<sup>22</sup> Since the court below in the instant case was the Fifth Circuit, the panel which rendered the decision below at least impliedly rejected the approach taken in the *General Drivers* case, discussed above.

<sup>23</sup> See also *United Ass'n of Journeymen, Local 106 (Columbia-Southern Chemical Corp.)*, 110 NLRB 206. There, the Pipefitters Union, which had a dispute with Westheimer, picketed at a highway leading to the premises of Columbia-Southern where Westheimer was relocating a boiler. Two other unions—the Teamsters and the Operating Engineers—which represented some of Westheimer's employees induced these employees to stop work. The Board found that the action of the Teamsters and the Operating Engineers was privileged primary activity and thus not violative of Section 8(b)(4)(A) (now Section 8(b)(4)(B)), despite the fact that those unions did not themselves have any dispute with Westheimer. The Board stated (110 NLRB at 209-210):

\*\*\* [A]s we read the legislative history of the provisions of Section 8(b)(4)(A) \*\*\* Congress was not concerned to protect primary employers against pressures by disinterested unions, but rather to protect disinterested employers against direct pressures by any union. Since Westheimer was not a disinterested employer, but the one

sions, the analysis set out above is proper, we submit, in situations, such as here, where two unions have a dispute with one and the same employer.

In short, we urge here, as in our brief in No. 111 (pp. 10-13), that the secondary boycott and related hot cargo provisions of the Act apply only where the work stoppage or contract provision is aimed not at the employer of the employees immediately involved, but at some other employer who, in the dispute between the union and the first employer—though he takes the brunt of the union's pressure—is really a neutral. Here, there is no question that Local 113's dispute was with the contractor (Armstrong) rather than with the employer (Thorpe) who furnished the prefabricated materials, and that the refusal to perform by Armstrong's employees was for the object of exerting pressure on Armstrong, and on no one else. Even though these employees were not as directly aggrieved as those whose local was a party to the agreement containing the work preservation clause in question, Local 113 in any event had no secondary objective. Here, in our view, the existence of a legitimate dispute and the absence of a secondary objective renders Section 8(b)(4)(B) inapplicable. Therefore, the Board's finding that the action of Local 113 was primary and thus outside the ban of Section 8(b)(4)(B) was proper. Accordingly, we submit, the court below erred in reversing the Board's dismissal of the complaint against Local 113.

---

whose labor relations policies had kindled the dispute herein, we find that any appeals by Teamsters or Operating Engineers to Westheimer's employees to respect Pipefitters' picket line would not contravene Section 8 (b)(4)(A) \* \* \*.

## CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed insofar as it sustains the Board's dismissal of the complaint against Local 22, and should be reversed insofar as it sets aside the remainder of the Board's order.

Respectfully submitted:

**THURGOOD MARSHALL,**

*Solicitor General.*

**FRANCIS X. BEYTAGH, Jr.,**

*Assistant to the Solicitor General.*

**ARNOLD ORDMAN,**

*General Counsel,*

**DOMINICK L. MANOLI,**

*Associate General Counsel,*

**NORTON J. COME,**

*Assistant General Counsel,*

**GEORGE B. DRISEN,**

*Attorney,*

*National Labor Relations Board.*

**DECEMBER 1966.**

## APPENDIX

---

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29, U.S.C. 151 *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e); (B) forcing or requiring any person to cease using,



selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in

this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8 (b) (4) (B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or sub-contractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

LIBRARY

APPELLATE COURT, U. S.

DEC 23 1966

JOHN T. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1966

No. 413

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

v.

HOUSTON INSULATION CONTRACTORS ASSOCIATION,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

---

**BRIEF OF RESPONDENT, HOUSTON  
INSULATION CONTRACTORS ASSOCIATION**

---

---

W. D. DEAKINS, JR.

2100 First City National  
Bank Building

Houston, Texas 77002

*Counsel for Respondent,  
Houston Insulation  
Contractors Association*

*Of Counsel:*

ROSS N. STERLING

VINSON, ELKINS, WEEMS & SEARLS

First City National Bank Building

Houston, Texas 77002

## INDEX

|                               | PAGE |
|-------------------------------|------|
| STATEMENT OF THE CASE .....   | 1    |
| QUESTION PRESENTED .....      | 2    |
| SUMMARY OF THE ARGUMENT ..... | 2    |
| ARGUMENT .....                | 2    |
| CONCLUSION .....              | 5    |
| CERTIFICATE OF SERVICE .....  | 5    |

## LIST OF AUTHORITIES

### Cases

|  |      |
|--|------|
| NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S.<br>675 (1951) .....  | 2, 3 |
| NLRB v. General Drivers, Local 968 (Otis Massey Co.),<br>225 F. 2d 205 (5th Cir. 1955), cert. denied, 350 U.S.<br>914 (1955) ..... | 3    |
| Milwaukee Plywood Co. v. NLRB, 285 F. 2d 325 (7th Cir.<br>1960) .....  | 3    |

### Statutes

|   |   |
|---|---|
| Section 7 of the Act (61 Stat. 136, 29 U.S.C. 151 et seq.) .... | 4 |
|---|---|



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1966

---

No. 413

---

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

v.

HOUSTON INSULATION CONTRACTORS ASSOCIATION,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

**BRIEF OF RESPONDENT, HOUSTON  
INSULATION CONTRACTORS ASSOCIATION**

---

**STATEMENT OF THE CASE**

The factual basis for the question presented in this case No. 413 is set forth in the brief of Petitioner, Houston Insulation Contractors Association in No. 206 at pages 2 through 10. This brief is submitted in reply to that portion of the brief for the National Labor Relations Board filed in both Nos. 206 and 413 dealing with the refusal by members of Local 113 of the International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, to apply pre-mitered fittings purchased by Armstrong Contracting & Supply Corporation from Thorpe Products Corporation in the course of insulating work at a plant under construction at Victoria, Texas.

## QUESTION PRESENTED

The question presented in No. 413, properly stated in the context of the case, is:

Whether a refusal by members of a local union to apply prefabricated materials purchased by their employer from an off job-site supplier is unlawful secondary activity where the prefabrication of the materials purchased had never been performed by members of the union, and the union had no contract and no dispute with the employer.

## SUMMARY OF THE ARGUMENT

Because there was no primary dispute between either Local 113 or Local 22 and Armstrong, the strike having secondary boycott impact upon a neutral employer, Thorpe, was unlawful under *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951). Section 7 of the Act does not create a right to strike in aid of another union where there is no dispute between the striking union and the employer.

## ARGUMENT

The argument of the Board that the work stoppage by Local 113 was lawful is based upon a crucial, yet false, assumption that there was a dispute between Local 113 and Armstrong. Respondent submits that Local 113 had no legitimate dispute with Armstrong which could be considered the object of lawful primary activity. The pre-mitered fittings purchased by Armstrong from Thorpe had never been prepared by members of Local 113. By refusing to apply fittings purchased from Thorpe, Local 113 could not possibly have been attempting to preserve work done by its members. Local 113 has no jurisdiction over the Houston area where the shops of Armstrong are located in

which other employees of Armstrong had previously prepared pre-mitered fittings. Armstrong had no contract with Local 113 although it did have a contract with Local 22 containing provisions that Armstrong would operate under the rules and conditions established in localities outside of the jurisdiction of Local 22 by contracts between local unions and employers in such other localities. In contracts with employers in the jurisdiction of Local 113 there were provisions governing sub-contracting identical to those in the contract between Armstrong and Local 22.

On these facts, the Court of Appeals properly held that Local 113 was engaging in unlawful activity and "... coercing Armstrong not for its own benefit but for the benefit of another local at the expense of a neutral employer . . ." In so holding, the court below cites *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951), (R. 242), but does not base its holding upon the rule expressed in that case that strike action or picketing is unlawful where "an object" thereof is to obtain a prohibited result. Nevertheless, the Court of Appeals states that where the effect of strike action by Local 113 is felt by a neutral employer, Thorpe, it is improper for Local 113 to engage in refusals to work on materials supplied by Thorpe in aid of another local which might be affected in the amount of work normally performed by its members.

The distinguishing factor in the opinion of the Court of Appeals and the decisions in *NLRB v. General Drivers, Local 968 (Otis Massey Co.)*, 225 F. 2d 205 (5th Cir. 1955), cert. denied, 350 U.S. 914 (1955), and *Milwaukee Plywood Co. v. NLRB*, 285 F. 2d 325 (7th Cir. 1960) is the impact of the strike conduct upon a neutral employer. It is submitted that the secondary boycott objective of the strike of Local 113 is clear in that even if Local 113 would have had a

legitimate work preservation objective, under *Denver Bldg. & Constr. Trades Council* the strike was unlawful. These arguments are set forth in full in the brief of Houston Insulation Contractors Association as Petitioner in No. 206.

It is difficult to reconcile the Board's laborious efforts to create some interest on the part of Local 113 which might legitimately be the subject of protection by strike action with its argument that no such interest is required. Unlike the decisions of lower courts and the NLRB upon which the Board relies, there was no primary dispute between Local 22 and Armstrong which was aided by the action of Local 113. This is purely an instance in which Local 113 engaged in strike conduct and thus created a previously non-existent dispute which was not, and could never be, its own. Section 7 of the Act (61 Stat. 136, 29 U.S.C. 151 *et seq.*) cited by the Board does not create the right of unions to engage in conduct such as shown by this record. That section merely creates the right of employees to organize and be members of unions. That right is subject to all of the limitations contained in other provisions of the Act. Although it is the position of Respondent that the Court of Appeals should have found the strike by Local 113 unlawful as a clear secondary boycott, the decision of the court below was correct in its assessment of the right of an employer to be protected from pressures brought by unions which had suffered no offense at the hands of the employer and to be protected from union pressure in controversies not their own.



## CONCLUSION

The decision of the Court of Appeals finding the strike by Local 113 to be unlawful and remanding the case to the Board for further determination of the involvement of the International Union in such conduct should be affirmed.

Respectfully submitted,

W. D. DEAKINS, JR.

2100 First City National  
Bank Building  
Houston, Texas 77002

*Counsel for Respondent,  
Houston Insulation  
Contractors Association*

*Of Counsel:*

ROSS N. STERLING

VINSON, ELKINS, WEEMS & SEARLS

First City National Bank Building  
Houston, Texas 77002

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of Respondent were served upon Counsel for Petitioner and the Solicitor General of the United States by placing the same in the United States Mails, Air Mail, postage prepaid, addressed to such Counsel at their addresses of record this ..... day of December, 1966.

.....  
W. D. Deakins, Jr.  
Attorney for Respondent

MAY 12 1967

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1966

No. 206HOUSTON INSULATION CONTRACTORS ASSOCIATION,  
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*No. 413NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*

v.

HOUSTON INSULATION CONTRACTORS ASSOCIATION,  
*Respondent.*ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT**PETITION FOR REHEARING OF HOUSTON  
INSULATION CONTRACTORS ASSOCIATION**W. D. DEAKINS, JR.  
2100 First City National  
Houston, Texas 77002*Counsel for Respondent,  
Houston Insulation  
Contractors Association**Of Counsel:*

ROSS N. STERLING

JOHN H. SMITHER

VINSON, ELKINS, WEEMS &amp; SEARLS

First City National Bank Building  
Houston, Texas 77002.

May 11, 1967

## INDEX

|  | PAGE |
|--|------|
| PETITION FOR REHEARING OF HOUSTON INSULATION CONTRACTORS ASSOCIATION .....                                     | 1    |
| CERTIFICATE OF COUNSEL .....   | 14   |
| CERTIFICATE OF SERVICE .....   | 14   |
| APPENDIX A .....   | 1a   |
| Portion of Conference Report No. 1147, 86th Cong., 1st Sess., pp. 38-40; I Leg. Hist. (1959), pp. 942-944 .... | 1a   |
| Section (704a) — Boycotts .....  | 1a   |
| Section 704(b) — Hot-Cargo Agreements .....  | 2a   |
| APPENDIX B .....   | 5a   |
| Statement by Senator Wayne Morse, 105 Cong. Rec. 16399, II Leg. Hist. (1959), p. 1428 .....                    | 5a   |
| APPENDIX C .....   | 7a   |
| Statement by Senator John F. Kennedy, 105 Cong. Rec. 16354, II Leg. Hist. (1959), p. 1433 .....                | 7a   |
| Hot Cargo — Section 704(B) .....   | 7a   |

## AUTHORITIES

|  |    |
|--|----|
| Construction Production & Maintenance Laborers Union Local 383 v. NLRB, (9 Cir. 1963) 323 F. 2d 422 .....                      | 3  |
| Gemsco, Inc. v. Walling, 324 U.S. 244 (1945) .....   | 9  |
| Holy Trinity Church v. United States, 143 U.S. 457 (1892) .....  | 7  |
| Local 761, Electrical Workers v. NLRB, 366 U.S. 667 (1961) .....   | 11 |
| Local Union No. 48 v. The Hardy Corp., (5 Cir. 1964) 332 F. 2d 682 .....   | 3  |
| Local 1976, United Brotherhood of Carpenters v. NLRB, 357 U.S. 93 (1958) .....   | 3  |
| NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951) .....   | 3  |
| National Woodwork Manufacturers Association, et al v. National Labor Relations Board (slip opinion dated April 17, 1967) ..... | 2  |

|   |    |
|---|----|
| Perry v. Commerce Loan Co., 383 U.S. 392 (1966) .....                               | 12 |
| Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384,<br>395-397 (1951) ..... | 9  |
| Western Union v. Lenroot, 323 U.S. 490 (1945) .....                                 | 10 |



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1966

---

No. 206

---

HOUSTON INSULATION CONTRACTORS ASSOCIATION,  
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

---

No. 413

---

NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*

v.

HOUSTON INSULATION CONTRACTORS ASSOCIATION,  
*Respondent.*

---

ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT.

---

**PETITION FOR REHEARING OF HOUSTON  
INSULATION CONTRACTORS ASSOCIATION**

---

Now comes Houston Insulation Contractors Association,  
Petitioner in No. 206 and Respondent in No. 413, and re-  
spectfully prays the Court to grant rehearings in these  
causes.

These are companion cases to Nos. 110 and 111, *National Woodwork Manufacturers Association, et al v. National Labor Relations Board* (slip opinion dated April 17, 1967) and were held to be governed by the decision of this Court in those cases.

In the face of the admission by the Union business agent that the refusal of the employees to install materials prepared off the jobsite was because the union had no contract with the supplier of these materials the Court sustained the finding in No. 206 that the boycott was for work preservation. In No. 413 the Court found a similar boycott to be primary activity because it sought to bring pressure upon the employer to preserve work for a separate local of the same union and not for the striking employees. Having concluded that the motive of these boycotts was work preservation the majority holds that the boycotts were primary activity and therefore outside the clear prohibitions of Section 8 (b) (4) (A) and (B) and Section 8 (e) of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) under the majority opinion in Nos. 110 and 111, despite the admitted secondary object of such conduct and the necessary consequence of forcing the employer "to cease using . . . or otherwise dealing in the products of . . . or to cease doing business . . ." with the suppliers of the boycotted materials.

The concurring memorandum of Mr. Justice Harlan encapsulates the basis for this decision as a determination that the Congress will not be deemed by this Court to mean what it clearly says unless there may be found a record of consideration of the problem at hand sufficient to satisfy this Court that the words enacted into law by the Congress were intended to be law. Whether or not the problems of "automation" or of "advancing technology" were explored in depth of economic analysis, Congress has

spoken, in words too plain to allow of any interpretation, that in the construction industry it is unlawful for an employer and a union to agree in any form or fashion that the employer will not do business with any other person—except for work to be done at the jobsite. It may be that in the past all construction work was done at the site of construction but on an ample record of awareness of the possible (and it is submitted, intended) result of the 1959 amendments to the Act, Congress fully understood, not the implications, for there is no room in the words of the statute for innuendo, the meaning of its clear and unambiguous words.

According to the Conference Report, the law as to secondary activity was to be preserved in the construction industry. (Conf. Rep. 1147, Appendix A hereto) Under Section 8 (b) (4) and *Sand Door (Local 1976 United Bhd. of Carpenters and Joiners of America v. NLRB)*, 357 U.S. 93 (1958), construing it, it was the law, and Congress intended that the law remain unchanged, that a strike to enforce an agreement which brought about the boycott of the goods of someone other than the employer was unlawful. Strike methods could not be employed to obtain such an agreement and strike methods could not be employed to enforce such an agreement. Suit for damages was the only possible means of redress available to the union for breach of such an agreement by the employer. *Local Union No. 48 v. The Hardy Corp.*, (5 Cir. 1964) 332 F.2d 682, *Construction Production & Maintenance Laborers Union Local 383 v. NLRB* (9 Cir. 1963) 323 F.2d 422. The rule was understood to be that where "an object" of strike methods was to cause a boycott of the goods of someone not a party to a labor controversy, that strike conduct was unlawful. *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951). The majority and concurring opinions

take this limited preservation of the prior law by Congress as an intention to preserve the *status quo* to the point of determining that Congress intended to preserve the *status ante quo* the decisions in *Sand Door* and *Denver Building Trades Council*.

One of the primary and admitted purposes for the enactment of the 1959 amendments was to close loopholes in the provisions of the Act dealing with "secondary" boycotts. After considerable debate and reference of the entire matter to a Conference Committee of both the House and Senate, the present statute became law. "Work preservation" was before both houses in the opposition statements as to the obvious effect of the amendments. (Remarks of Senator Wayne Morse, 105 Cong. Rec. 16399, Appendix B hereto) Nevertheless, the Report of the Conference Committee (attached hereto in pertinent part as Appendix A) reported out the Bill as one which would preserve the right, under Section 8 (e) for unions and management in the construction industry lawfully to agree in such a way as to create a boycott only as to on the jobsite work. The Conference Committee Report and the statements of then Senator John F. Kennedy (Appendix C hereto) concerning that Report left no room for doubt that as to work done away from the jobsite, whether by a manufacturer of finished parts for the overall construction project or otherwise, no agreement which would limit the employer would be lawful. The shadowy problems of "automation" and "advancing technology" in the construction industry ~~were~~ not unknown to the Congress. *Sand Door*, often referred to in the legislative history, dealt with that very problem.

Turning then to the words employed by Congress, the majority has made a nullity of the addition of Section 8(e) for if the proviso to Section 8(b) (4) (B) is to be taken when read in conjunction with Section 8(e) to create a



"work preservation" loophole, all is for naught. The hue and cry about the discrimination against other segments of labor by the provisos to Section 8(e) indicates unmistakably that Congress intended to preserve only those agreements which had, under the decisions of the Court, been found to be necessary for the continuation of orderly labor-management relations in the construction industry. It is equally clear that in doing so, Congress understood and believed that the *only* such matter requiring protection was on the jobsite subcontracting. It is this melding of principles which alone can explain the proviso tacked on to Section 8(b) (4) (B). Petitioner submits that to take the proviso of Section 8(e) as an indication of a limitation upon the scope of the overall application of its outlawry of agreements not to deal in the goods of others is to raise a problem of unequal treatment undreamed of by Congress in favor of the construction unions.

The lack of attention to the bill introduced by Representative Alger dealing with union attempts to limit prefabrication of building materials is equally explainable on the basis that Congress took care of that problem in the amendments passed. Work preservation as a matter of agreement was specifically retained in the construction industry proviso of § 8(e) for work at the site of construction. Work preservation under the clear terms of the amendments, was not to be legitimate if it took from the construction employer his freedom to purchase materials from off jobsite manufacturers or suppliers. (Conf. Rep. No. 1147, Appendix A.)

The resort to a supposed lack of legislative history which the majority and concurring opinions employ to circumvent the clear language of Sections 8(e) and 8(b) (4) (B) in this case is surely not the "interesting lesson" which Mr. Archibald Cox had in mind when he made the observation in 1947 that,

"Second, it is becoming increasingly common to manufacture 'legislative history' during the course of legislation. The accusations of outside participation made in Congress, and the elaborate interpretations in some passages in the committee reports, suggest the danger that this occurred during consideration of the Taft-Hartley amendments. Judicial exposition of the way in which the balance is struck between these opposing considerations would offer an interesting lesson in the techniques of statutory construction." 61 Harv. L.R. 1, 44.

Perhaps the most unfortunate aspect of this decision is not the substance of the three divergent inferences which the Court has drawn from that history, but the technique of statutory construction employed by the majority, as fully expounded in Justice Harlan's concurring opinion.

Four Justices, not a majority, concluded:

"That Congress meant §§ 8(e) and 8(b) (4) (B) to prohibit only 'secondary' objectives clearly appears from an examination of the history of congressional action on the subject; we may, by such an examination, 'reconstitute the gamut of values current at the time when the words were uttered.'" (slip opinion, Nos. 110, 111, p. 6).

An equal number of the court drew the opposite inference from the legislative and decisional history:

"The Court undertakes a protracted review of legislative and decisional history in an effort to show that the clear words of the statute should be disregarded in these cases. But the fact is that the relevant history fully confirms that Congress meant what it said, and I therefore dissent." (dissenting slip opinion, Nos. 110, 111, p. 1)

Finally, there is a third inference, the substance of which is not nearly as crucial as the matter in which it is applied to the case:

"We are thus left with a legislative history which, on the precise point at issue, is essentially negative, which shows with fair conclusiveness only that Congress was not squarely faced with the problem this case presents." (concurring slip opinion, Nos. 110, 111, pp. 2, 3)

It is not uncommon for the court to interpret a statute where the precise point in issue was not faced by Congress when writing the statute. *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), cited by the majority, is illustrative of such circumstances.

Despite the cogent warnings by Mr. Justice Harlan that:

"... we must be especially careful to eschew a resolution of the issue according to our own economic ideas and to find one in what Congress has done," (Concurring slip opinion, Nos. 110, 111, p. 2)

the concurring and majority opinions turn the case not on what Congress has done but on what the Court says it has not done as shown by the "negative legislative history," and excludes the activity in question from the literal terms of the Act. The majority now require that the Legislature must make a record satisfactory to the Court before the plain language of its enactments will be applied.

Petitioner believes that if resort to legislative history is required, the record is ample to support the inference drawn by the dissenting Justices that the legislature meant what it said. If the silence of the sponsors is "pregnant with significance," this Court should not under its own precautionary words, abort the plain words of the statute by attempting to divine what that silence means.

Mr. Justice Jackson has articulated the common-sense reason for respecting the unambiguous words of a statute in the following way:

"I agree with the Court's judgment and with its opinion insofar as it rests upon the language of the Miller-Tydings Act. But it does not appear that there is either necessity or propriety in going back of it into legislative history.

"Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond committee reports, which 'presumably are well considered and carefully prepared. I cannot deny that I have sometimes offended against the rule. But to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions. The Rules of the House and Senate, with the sanction of the Constitution, require three readings of an Act in each House before final enactment. That is intended, I take it, to make sure that each House knows what it is passing and passes what it wants, and that what is enacted was formally reduced to writing. It is the business of Congress to sum up its own debates in its legislation. Moreover, it is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that in signing a bill the President endorses the whole Congressional Record. For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation.

"Moreover, there are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are. Here is a controversy which affects every little merchant in many States. Aside from a few offices in the larger cities, the materials of legislative history are not avail-



able to the lawyer who can afford neither the cost of acquisition, the cost of housing, nor the cost of repeatedly examining the whole congressional history. Moreover, if he could, he would not know any way of anticipating what would impress enough members of the Court to be controlling. To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.

"By and large, I think our function was well stated by Mr. Justice Holmes: "We do not inquire what the legislature meant; we ask only what the statute means." Holmes, *Collected Legal Papers* 207. See also *Soon Hing v. Crowley*, 113 U.S. 703, 710, 711 28 L.Ed. 1145, 1147 5 S. Ct. 730. And I can think of no better example of legislative history that is unedifying and unilluminating than that of the Act before us." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-397 (1951).

In *Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945), this court was faced with the difficult task of ascertaining whether the administrator of the Wage and Hour Division of the Department of Labor had authority under Section 8(f) of the Fair Labor Standards Act, 29 U.S.C. § 208(f), 52 Stat. 1060, to prohibit industrial homework as a necessary means of making effective a minimum wage order for the embroideries industry. The petitioners argued that the prohibition of industrial homework would be a form of ". . . experimental social legislation touching a matter not incidental to the order, but in the nature of a wholly independent subject beyond the purview of the statute and therefore of the Administrator's power." (*id.* at 256-257). The argument was bolstered by an analysis of the legislative history.

The Court gave effect to the Administrator's powers in such a way as to accomplish social and economic reforms

neither specifically nor generally within the intent of Congress in passing the measure, but within the literal wording of the statute.

Mr. Justice Roberts, dissenting, found from a detailed analysis of the legislative history that the banning of industrial homework was considered and rejected by Congress. Concerning this history, the majority had this to say,

"The argument from the legislative history undertakes, in effect, to contradict the terms of § 8(f) by negative inferences drawn from inconclusive events occurring in the course of consideration of the various and widely differing bills which finally, by compromise and adjustment between the two Houses of Congress, emerged from the conference as the Act. The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious basis for inference in every direction. This is such a case." (324 U.S. at 260).

It is beyond dispute that Section 8(b) (4) is aimed at the secondary product boycott. The presence of a difficult issue, which arguably was not specifically or generally contemplated by Congress, provides no proper basis for construction of words which are not ambiguous, even though giving effect to those words incidentally speaks to the possible larger economic consequences of automation.

*Western Union v. Lenroot*, 323 U.S. 490 (1945), presented the issue of whether or not the Fair Labor Standards Act of 1938 prohibited the employment of child labor in interstate commerce. Literally, the Act did not prohibit such employment. The Court turned to the legislative history, from which it concluded:

"Our search of legislative history yields nothing to support the Company's contention that Congress did not want to reach such child labor as we have here.

And it yields no more to support the Government's contention that Congress wanted to forego direct prohibition in favor of indirect sanctions. Indeed, we are unable to say that elimination of the direct prohibitions from the final form of the bill was purposeful at all or that it did not happen from sheer inadvertence, due to concentration on more vital and controversial aspects of the legislation. The most that we can make of it is that no definite policy either way appears in reference to such an employment as we have in this case, no legislative intent is manifest as to the facts of this case which we should strain to effectuate by interpretation. Of course, if by fair construction the indirect sanctions of the Act apply to this employment, courts may not refuse to enforce them merely because we cannot understand why a singular and more direct method was used. *But we take the Act as Congress gave it to us, without attempting to conform it to any notions of what Congress would have done if the circumstances of this case had been put before it.*" (323 U.S. at 500, emphasis added).

While the negative legislative history may have been pregnant with significance, the significance to the court was that the terms should be applied literally, as to do otherwise would,

"... bring into question the candor of Congress as well as the integrity of the interpretative process. After all, this law was passed as the rule by which employers and workmen must order their lives." (id. at p. 508).

Of course, section 8(b) (4) was not applied literally in *Local 761, Electrical Workers v. NLRB*, 366 U.S. 667 (1961), but the affirmative legislative history clearly showed Congressional intent to distinguish "primary" and "secondary" activities, and the case was decided without dissent. That case is not analogous to the one at hand which involves the widest possible division of opinion, and which in fact has turned on the finding that there is no history on the point in issue.

In *Perry v. Commerce Loan Co.*, 383 U.S. 392 (1966), Mr. Justice Harlan dissented by discussing the various arguments put forward by the majority, and alluded to the legislative functions of Congress and the judiciary in the following way:

"The short of the matter is that the Court's arguments do no support the conclusion it reaches. The conclusion is of course supportable as a legislative judgment, even though arguments can be made for both sides." (id. at p. 409).

He then discusses various legislative arguments contrary to those of the majority, and placed all such considerations in their proper perspective by stating:

"I venture considerations such as these not as overcoming the countervailing ones relied on by the Court, and heretofore espoused by others, but simply to point up the fact that this is not one of those cases where seemingly straightforward statutory language must yield its literal meaning to a contrary congressional intent. What we have here are but two contrasting legislative policies, wherein the Court's duty is to take the statute as it is presently plainly written." (id. at page 410).

In Nos. 206 and 413 there are at least two, perhaps more, contrasting legislative policies. And, if as Mr. Justice Harlan articulates the dilemma, Congress has *no intent* as to the problem the case at hand presents, because Congress was not squarely faced with it, there can be no overriding intent contrary to the statute's terms. In such circumstances, "... the Court's duty is to take the statute as it presently is plainly written." *Perry v. Commerce Loan Co.*, *supra*.

By its decision the majority has thrown a stumbling block of unknown proportions in the path of legislation. When will Congress ever know when it has made a suffi-



cient record, heard enough testimony, or investigated the impact of its enactments in sufficient depth? The fact that Congress may be presently conducting investigations into the impact of automation and advancing technology upon workers generally and possible solutions for any evil results (slip opinion Nos. 110, 110, pp. 27, 28) does not indicate an intention by Congress that the construction industry must remain in lock step with the past. If that were what was intended there would be no need to search for solutions because no problems would be created and the construction industry would simply plod onward subject to boycotts of products or materials from off jobsite suppliers if such materials or supplies were ever subject to jobsite fabrication. This clearly is not what Congress intended.

This Petition for Rehearing should be granted, and both cases set down for reargument on the regular calendar.

Respectfully submitted,

W. D. DEAKINS, JR.  
2100 First City National  
Bank Building  
Houston, Texas 77002

*Counsel for Respondent,  
Houston Insulation  
Contractors Association*

*Of Counsel:*

ROSS N. STERLING  
JOHN H. SMITHER  
VINSON, ELKINS, WEEMS & SEARLS  
First City National Bank Building  
Houston, Texas 77002

**CERTIFICATE OF COUNSEL**

I certify that this petition is presented in good faith and not for delay.

.....  
**W. D. DEAKINS, JR.**

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Petition for Rehearing were served upon Counsel for the National Labor Relations Board and the Solicitor General of the United States by placing the same in the United States Mails, Air Mail, postage prepaid, addressed to such Counsel at their addresses of record this ..... day of May, 1967.

.....  
**W. D. DEAKINS, JR.**  
*Attorney for Respondent*

## APPENDIX A

Portion of Conference Report No. 1147, 86th Cong., 1st Sess., pp. 38-40; I Leg. Hist. (1959), pp. 942-944.

## SECTION (704a) — BOYCOTTS

The House amendment contains provisions amending the secondary boycott provisions of section 8(b)(4) of the National Labor Relations Act, as amended. The Senate bill does not contain comparable provisions. The conference committee adopted the provisions of the House amendment with the following changes: (1) the phrase "or agree to cease" was deleted from section 8(b)(4)(B) because the committee of conference concluded that the restrictions imposed by such language were included in the other provisions dealing with prohibitions against entering into "hot cargo" agreements, and therefore their retention in section 8(b)(4)(B) would constitute a duplication of language; (2) a proviso was added which specified that for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary labor dispute and are distributed by another employer as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services at the establishment of the employer engaged in such distribution; (3) no language has been included with reference to struck work because the committee of conference did not wish to change the existing law as illustrated by such decisions as *Doubs v.*

*Metropolitan Federation of Architects* (75 Fed. Supp. 672 (S.D.N.Y. 1948)) and *NLRB v. Business Machine and Office Appliance Mechanics Board* (228 Fed. 2d 553); (4) the amendment adopted by the committee of conference contains a provision "that nothing contained in clause (B) of this paragraph (4) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." The purpose of this provision is to make it clear that the changes in section 8(b) (4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute. This provision does not eliminate, restrict, or modify the limitations on picketing at the site of a primary labor dispute that are in existing law. See, for example, *NLRB v. Denver Building and Construction Trades Council, et al.* (341 U.S. 675 (1951)); *Brotherhood of Painters, Decorators, and Paper Hangers, etc., and Pittsburgh Plate Glass Co.* (110 NLRB 455 (1954)); *Moore Drydock Co.* (81 NLRB 1108); *Washington Coca Cola Bottling Works, Inc.* (107 NLRB 233 (1953)).

#### SECTION 704(b) — HOT-CARGO AGREEMENTS

The Senate bill amends section 8 of the National Labor Relations Act, as amended, by adding at the end thereof a new subsection (e) which makes it an unfair labor practice for any labor organization and any employer who is a common carrier subject to part II of the Interstate Commerce Act to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, or transporting any of the products of any other employer, or to cease doing business with the same.

The House amendment amends section 8 of the National Labor Relations Act, as amended, by adding at the end thereof a new subsection (e) to make it an unfair labor



practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person. The House amendment also makes any such agreement heretofore or hereafter executed unenforceable and void.

The committee of conference adopted the House amendment but added three provisos. The first proviso specifies —

that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

It should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the site of the construction. The proviso does not exempt from section 8(e) agreements relating to supplies or other products or materials shipped or otherwise transported to and delivered on the site of the construction. The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts would be illegal under the *Sand Door* case (*Local 1796, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958)). To the extent that such agreements are legal

today under section 8(b)(4) of the National Labor Relations Act, as amended, the proviso would prevent such legality from being affected by section 8(e). The proviso applies only to section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). The *Denver Building Trades* case and the *Moore Drydock* cases would remain in full force and effect. The proviso is not intended to limit, change, or modify the present state of the law with respect to picketing at the site of a construction project. Restrictions and limitations imposed upon such picketing under present law as interpreted, for example, in the U.S. Supreme Court decision in the *Denver Building Trades* case would remain in full force and effect. It is not intended that the proviso change the existing law with respect to judicial enforcement of these contracts or with respect to the legality of a strike to obtain such a contract.

The second proviso specifies that, for the purposes of this subsection (e) and section 8(b)(4) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of a jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry. This proviso grants a limited exemption in three specific situations in the apparel and clothing industry, but in no other industry regardless of whether similar integrated processes of production may exist between jobbers, manufacturers, contractors, and subcontractors.

The third proviso applies solely to the apparel and clothing industry.

**APPENDIX B**

**Statement by Senator Wayne Morse, 105 Cong.**

**Rec. 16399, II Leg. Hist. (1959), p. 1428.**

The bill makes it illegal for a union and an employer "to enter into any contract or agreement, express or implied, whereby such employer" ceases or agrees to cease to do business with another employer or person. This is the so-called hot cargo agreement. Suppose a union approaches an employer and persuades him — by words that none can fail to recognize are nothing but persuasion — to cease buying the product of another employer whose employees are on strike. When the employer thus concurs in the union's plea, does that become an illegal "contract or agreement, express or implied?" Does the bill in effect compel the neutral employer to side with the struck employer rather than his employees and their union?

Furthermore, there is no reason to legalize even a true hot cargo agreement. Present law forbids enforcing the agreement by a strike or picketing to induce a strike if the contracting employer declines to adhere to his agreement. This bill prohibits a strike or picketing to obtain entry into the agreement. Yet this bill goes even further and illegalizes the agreement even though it was not procured through a strike or picketing and even though no effort is made to enforce it by a strike or picketing. The bill thus outlaws an entirely voluntary compact with which the employer is perfectly happy to comply. Although his sympathy or interest may be entirely on the union's side, the employer is forbidden to contract on the basis of that sympathy or interest. The neutral employer is now compelled to side with the struck employer rather than the union, whether he likes it or not.

The far-reaching effect of this proposal is something on which there are no hearings. The conferees, and certainly no member of this body, have any idea how many labor agreements contain such provisions. Examples that come to my mind which would be banned by these provisions are as follows:

First. It would prevent a union from protecting the bargaining unit it represents by obtaining an agreement not to subcontract work normally performed by employees in the unit.



## APPENDIX C

Statement by Senator John F. Kennedy, 105  
Cong. Rec. 16354, II Leg. Hist. (1959), p. 1433.

## HOT CARGO — SECTION 704(B)

The first proviso under new section 8(e) of the National Labor Relations Act is intended to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.

This proviso affects only section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). The *Denver Building Trades*, (341 U.S. 875) and the *Moore Drydock* (92 N.L.R.B. 547) cases would remain in force.

Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them. Since the proviso does not relate to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) whenever the *Sand Door* case (357 U.S. 93) is applicable.

It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract.

It should be particularly noted that the proviso relates only to the "contracting or subcontracting of work to be done at the site of the construction." The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite.

# SUPREME COURT OF THE UNITED STATES

Nos. 206 AND 413.—OCTOBER TERM, 1966.

Houston Insulation Contractors  
Association, Petitioner,

206

v.

National Labor Relations Board.

National Labor Relations Board,  
Petitioner,

413

v.

Houston Insulation Contractors  
Association.

On Writs of Certiorari  
to the United States  
Court of Appeals for  
the Fifth Circuit.

[April 17, 1967.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

These are companion cases to Nos. 110 and 111, *National Woodwork Mfgs. Association v. Labor Board*, ante. A provision of the collective bargaining agreement between the Houston Insulation Contractors Association and Local 22, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, provides, in pertinent part, that the employer will not contract out work relating to "the preparation, distribution and application of pipe and boiler coverings." In No. 206, the Contractors' Association seeks review of the dismissal by the National Labor Relation Board, 148 N. L. R. B. 866, affirmed by the Court of Appeals for the Fifth Circuit, 357 F. 2d 182, 189, of § 8 (b)(4)(B) charges brought against Local 22 because of its activities designed to enforce the agreement. In No. 413, the Board challenges the holding of the Court of Appeals, reversing the Board, that similar conduct by a sister Local 113, designed to protect the work guaranteed to Local 22 by the agreement, violated § 8 (b)(4)(B).

## 2 INSULATION CONTRACTORS ASSN. v. NLRB.

We granted both petitions and set them for argument with Nos. 110 and 111. We affirm in No. 206 and reverse in No. 413.

*No. 206:* Johns-Manville Company, a member of the Contractors' Association, engaged in a construction project in Texas City, Texas, purchased from Techalloy Corporation, a manufacturer of insulation materials, stainless steel bands used to fasten asbestos material around pipes to be insulated. The bands had been pre-cut to specification by Techalloy's employees. Customarily, Johns-Manville had ordered rolls of wire which were then cut to size by members of Local 22. This pre-cutting work was reserved for Johns-Manville employee members of Local 22 by the quoted provision of the collective bargaining agreement between the Association and the Local. Agents of Local 22 instructed its members on the jobsite not to install the pre-cut bands. After the hearing on the complaint issued on the Contractors Association's charge that this conduct violated § 8 (b)(4)(B), the Board held that "the conduct complained of herein was taken to protest . . . a deprivation of work, its object being to protect or preserve for employees certain work customarily performed by them. This conduct constituted primary activity and is protected by the Act . . . ." 148 N. L. R. B., at 869. The Court of Appeals found that there was substantial evidence to support this finding and sustained it.<sup>1</sup> The Association

---

<sup>1</sup> The Association did not charge the Union with violation of § 8 (e), and the validity of the work-preservation clause was not an issue in the hearing before the Board. But the Board appears to have assumed that the clause was valid in holding that the object of the Union's conduct pursuant thereto was a primary one of work preservation. The Court of Appeals expressly held, as an aspect of its finding that § 8 (b)(4)(B) was not violated by Local 22's activities, that the clause was valid. 357 F. 2d, at 188-189.

**INSULATION CONTRACTORS ASSN. v. NLRB. 3**

here attacks the substantiality of the evidence supporting the Board's finding, but we agree with the Court of Appeals. See *Universal Camera Corp. v. Labor Board*, 340 U. S. 474. In that circumstance our holding today in *National Woodwork Mfgs. Assn. v. Labor Board*, ante, requires an affirmance in No. 206.

No. 413: Armstrong Company, a member of the Contractors' Association, was engaged in a construction project in Victoria, Texas, within the jurisdiction of Local 113 of the Heat and Frost Insulators and Asbestos Workers. The cutting and mitering of asbestos fittings for such jobs was customarily performed at Armstrong's Houston shop, which was within Local 22's jurisdiction. Armstrong purchased from Thorpe Company, a manufacturer of insulation materials, asbestos fittings upon which the cutting and mitering work had already been performed. Agents of Local 113 informed Armstrong that fittings would not be installed unless the cutting and mitering had been performed by its sister Local 22 as provided by Local 22's bargaining agreement.<sup>3</sup> The Board found, as it had in No. 206, that the object of this refusal was primary—the preservation of work customarily performed by Armstrong's own employees. 148 N. L. R. B., at 869. The Court of Appeals reversed on the ground that Local 113 “had no economic interest in Local 22's claim of breach of contract,” and that therefore “it was coercing Armstrong not for its own benefit but for the benefit of another local at the expense of a neutral employer.” 357 F. 2d, at 189. We disagree.

---

<sup>3</sup> A mitered fitting is described by the president of Thorpe Company as “an insulation item that is used to cover something other than a straight piece of pipe in a pipe line, and this is made by taking standard insulation pipe covering and covering and cutting it on a bias or miter and then gluing it together or sticking it together so that it will conform to the fitting that you are trying to shape it to.”



#### 4 INSULATION CONTRACTORS ASSN. v. NLRB.

*National Woodwork Mfgs., ante*, holds that collective activity by employees of the primary employer, the object of which is to affect the labor policies of that primary employer, and not engaged in for its effect elsewhere, is protected primary activity. "Congress was not concerned to protect primary employers against pressures by disinterested unions, but rather to protect disinterested employers against direct pressures by any union."<sup>2</sup> The finding of the Board, supported by substantial evidence, was that Local 113's object was to influence Armstrong in a dispute with Armstrong employees, and not for its effect elsewhere.

Primary employees have traditionally been assured the right to take concerted action against their employer to gain the "mutual aid and protection" guaranteed by § 7 of the Act, whether or not the resolution of the particular dispute directly affects all of them. As Judge Learned Hand stated in *Labor Board v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503, 505:

"When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one who they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts."

A boycott cannot become secondary because engaged in by primary employees not directly affected by the dispute,

<sup>2</sup> United Association of Journeymen, Local 106 (Columbia-Southern Chemical Corporation), 110 N. L. R. B. 206, 209-210.

**INSULATION CONTRACTORS ASSN. v. NLRB. 5**

or because only engaged in by some of the primary employees, and not the entire group. Since that situation does not involve the employer in a dispute not his own, his employees' conduct in support of their fellow employees is not secondary and, therefore, not a violation of § 8 (b)(4)(B).

The judgment of the Court of Appeals in No. 206 is affirmed and in No. 413 is reversed.

*It is so ordered.*

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, and MR. JUSTICE STEWART dissent for the reasons expressed in MR. JUSTICE STEWART's dissenting opinion in *Woodwork Manufacturers v. National Labor Relations Board*, ante, p. —.